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PARLIAMENTARY CONTROL OF SUBORDINATE LEGISLATION IN CANADA

by

© BAYARD WILLIAM REESOR

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

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THE UNIVERSITY OF ALBERTA

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled "Parliamentary Control of Subordinate Legislation in Canada" submitted by Bayard William Reesor in partial fulfilment of the requirements for the degree of Doctor of Philosophy.

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To

Mother and Dad

ABSTRACT

This study has been motivated by a concern that Parliament is not adequately supervising the use of legislative authority which it delegates to the cabinet, individual ministers, and other bodies. While the writer accepts the inevitability of subordinate legislation, he believes that there must be adequate provision for its control. Both the executive and judicial branches of government have important roles to play in this control, but it is assumed that the main responsibility must rest with the legislature. For control to be successful there must be proper machinery, and concern that control is essential. The results of this study indicate that, in the past, neither condition has been adequately met.

Almost the only chances which members of Parliament have had to scrutinize subordinate legislation have been the normal debating opportunities. Although the 1950 Regulations Act required the publication and tabling of regulations, these provisions did little if anything to facilitate parliamentary review. The bureaucracy examined all draft regulations under the terms of the Regulations Act and the Bill of Rights, but there was no assurance that all regulations were submitted for this review. The judiciary seems to have been limited to a determination of whether regulations fall within the scope of the enabling legislation. But no matter how necessary the bureaucracy and judiciary may be within the total framework of control, or how diligently they perform their tasks, they cannot compensate for Parliament's inadequacy.

Recognizing the inadequacy of its rules to scrutinize subordinate legislation, the House of Commons in 1968 established the Special Committee on Statutory Instruments, whose function was to recommend appropriate review procedures. The result, begun in 1971, was threefold: the passage of the Statutory Instruments Act, the issuance of two cabinet directives, and the creation of the Joint Standing Committee on Regulations and other Statutory Instruments. By means of this new machinery it is anticipated that examination by the bureaucracy will be more extensive; that enabling legislation will be more carefully drafted and will avoid the delegation of certain objectionable powers; and, most important, that Parliament will scrutinize all subordinate legislation.

To be effective, however, machinery must be operated by people who are anxious that it perform well. Unfortunately, the present study found that, with few exceptions, members of Parliament have been unconcerned about controlling subordinate legislation. The scrutiny committee has not yet begun its review of regulations. Whether it will be effective in spite of the apparent apathy of Parliament, or will be able to overcome that apathy, is yet to be seen.

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TABLE OF CONTENTS

CHAPTER PAGE

I. INTRODUCTION 1

The Legislature and the Executive 6

Reasons for the Delegation of Power 12

The Problem of Abuse 14

Problems of Terminology 17

II. EXTENT OF DELEGATION BY THE STATUTES OF CANADA 26

Significant Characteristics of Delegated Power 26

Conclusion 43

III. OVERVIEW OF PARLIAMENTARY CONTROLS TO 1971 50

Control Measures having General Application 50

Control Measures Applicable to Individual Statutes . . 57

Conclusion 66

IV. CONTROL EXERCISED BY THE EXECUTIVE 72

The Wording of Enabling Legislation 73

The Drafting of Regulations 77

Examination of Regulations Subject to the Regulations Act. 83

Documents not Examined under the Regulations Act . . . 87

Regulations and the Political Executive 91

Conclusion 92

CHAPTER PAGE

V. CONTROL BY THE JUDICIARY 100

The Meaning of Delegated Legislative Power 102

Judicial Review of Delegated Legislative Power 103

Judicial Review of Delegated Administrative Power . . 107

Conclusion 113

VI. THE HOUSE OF COMMONS SPECIAL COMMITTEE ON STATUTORY INSTRUMENTS 119

The Meaning of "Regulation" 124

Enabling Legislation 126

Advance Consultation 130

Drafting and Examining Regulations 131

Publication of Regulations 132

Tabling Regulations 134

Scrutinizing Regulations 135

Conclusion 148

VII. THE SECOND SESSION OF THE TWENTY-EIGHTH PARLIAMENT (1969-70) 160

Some Characteristics of Public Bills on the Order Paper 161

The Nature of Parliament's Concern 179

Conclusion 194

VIII. IMPLEMENTATION OF THE STATUTORY INSTRUMENTS COMMITTEE RECOMMENDATIONS 202

The Statutory Instruments Act 202

The Cabinet Directives 216

CHAPTER PAGE

Establishment of the Scrutiny Committee 217

Conclusion 218

IX. CONCLUSION 225

Extent of Delegated Power 226

Control by the Executive 230

Control by the Judiciary 233

The Role of Parliament 234

BIBLIOGRAPHY 248

APPENDIX A. REGULATIONS ACT AND REGULATIONS MADE PURSUANT TO IT 256

APPENDIX B. STATUTORY INSTRUMENTS ACT AND REGULATIONS MADE PURSUANT TO IT 265

APPENDIX C. ESTIMATING NUMBER OF STATUTES IN FORCE, 1967-68 . 286

APPENDIX D. HOUSE OF COMMONS SPECIAL COMMITTEE ON STATUTORY INSTRUMENTS, 1968-69: QUESTIONNAIRE 291

APPENDIX E. SUMMARY OF DEBATES DURING THE 1969-70 SESSION . . 293

APPENDIX F. FREQUENCY OF COMMENTS BY MEMBERS OF PARLIAMENT, 1969-70 387

APPENDIX G. HOUSE OF COMMONS SPECIAL COMMITTEE ON STATUTORY INSTRUMENTS, 1968-69: RECOMMENDATIONS AND THEIR IMPLEMENTATION 392

LIST OF TABLES

Table Page

1. Frequency of Delegation to Individual Ministers (1967-68 Acts-in-Force) 28

2. Frequency of Authority to Subdelegate (1967-68 Acts-in-Force) 30

3. Frequency of Authority to Impose Penalties (1967-68 Acts-in-Force) 32

4. Frequency of Authority to Amend Parent Act (1967-68 Acts-in-Force) 37

5. Generality of Delegation (Number of Instances) 1967-68 Acts-in-Force 40

6. Frequency of Control Provisions (1967-68 Acts-in-Force 58

7. Characteristics of Publication Requirement (1967-68 Acts-in-Force) 59

8. Characteristics of Requirement to Publish and Table (1967-68 Acts-in-Force) 63

9. Participation by Committee Members 122

10. Number of Public Bills on the 1969-70 Order Paper 162

11. Frequency of Delegations to Individual Ministers (1969-70 Bills Becoming Law) 164

12. Recipients of Power (1969-70 Bills Beyond First Reading but not Becoming Law) 165

13. Frequency of Delegation to Individual Ministers (1969-70 Private Members' Bills not Beyond First Reading) 166

14. Frequency of Authority to Subdelegate (1969-70) 167

15. Frequency of Authority to Impose Penalties (1969-70) 168

Table Page

16. Frequency of Power to Amend Parent Act (1969-70) 171

17. Generality of Delegation, 1969-70 (Number of Instances) 174

18. Delegations to Types of Recipients (1967-68 Compared with 1969-70 Statutes) 175

19. Generality of Delegation (1967-68 Compared with 1969-70 Statutes) 176

20. Frequency of Control Provisions (1969-70) 177

21. Frequency of Comments, by Party (1969-70) 181

22. Number of Comments Per Member, House of Commons (1969-70) 183

23. Number of Comments Per Member, Senate (1969-70) 183

24. Number of Critical Comments Per Member, House of Commons (1969-70) 184

25. Number of Critical Comments Per Member, Senate (1969-70) 184

26. Comments by Statutory Instruments Committee Members During the 1969-70 Session 187

27. Distribution of Comments in House of Commons, by Debate Opportunity and Party (1969-70) 189

28. Distribution of Comments in Senate, by Debate Opportunity and Party (1969-70) 190

29. Distribution of Comments in House of Commons, by Subject and Party (1969-70) 191

30. Distribution of Comments in Senate, by Subject and Party (1969-70) 192

31. Discussion of Certain Characteristics of Bills (1969-70) 195

32. Distribution of Comments, by Subject and Debate Opportunity (1969-70) 196

LIST OF FIGURES

Figure	Page
1. Stages Governing the Making of Regulations under the Regulations Act and the Bill of Rights	51
2. Stages Governing the Making of Regulations and other Statutory Instruments under the Statutory Instruments Act and the Bill of Rights	203

CHAPTER I

INTRODUCTION

> Delegation of "lawmaking" power is the dynamo of modern government. The English kings generated their own power, the prerogative. Parliament curtailed the prerogative, increased the role of statute, and as laissez-faire took hold, the role of private power. Today, while theory still affirms legislative supremacy, we see power flowing back increasingly to the executive, to referred rather than original power.[1]

The relationship among prerogative, statute, and delegated law has been expressed by Sir Cecil Carr as follows:

> The first and now far the smallest part is made by the Crown under what survives of the prerogative. The second and weightiest part is made by the King in Parliament and consists of what we call Acts of Parliament. The third and bulkiest part is made by such persons or bodies as the King in Parliament entrusts with legislative power. . . . It is directly related to Acts of Parliament, related as child to parent, a growing child called upon to relieve the parent of the strain of overwork, and capable of attending to minor matters while the parent manages the main business.[2]

The principle of delegating legislative power is well established in Canada, as elsewhere. However, increasingly there is concern about the tremendous growth of subordinate legislation (the "third and bulkiest part")--concern that the child rather than the parent is becoming the manager of "the main business."

Approximately sixty per cent of the Statutes of Canada delegate power to the executive branch of government, and much use is made of this delegated authority. Regulations made pursuant to enabling provisions are not, of course, subject to the same kind of parliamentary scrutiny and control as are the parent statutes. Increasingly, however, subordinate legislation has become the point of contact between the people and their government. If the element of discretion is slight, if the delegated power is small, then the absence of parliamentary control may not be serious. However, when for example the Governor-in-Council is authorized to make regulations prohibiting the immigration of persons because of their "probable inability" to become good Canadian citizens,[3] then lack of parliamentary control might well be cause for concern.

J. R. Mallory in 1953 noted that, with the exception of the period during World War One, Canada encountered the difficulty of parliamentary control of subordinate legislation only at the beginning of World War Two. He asserted that before World War Two the cabinet could understand and deal with the details of government policy, and Parliament had sufficient time "to act as a watch-dog of the executive." Since then, however, the increase in subordinate legislation has "led to a major readjustment in the relationships of Parliament to Cabinet and Cabinet to the civil service." But "procedural adaptation at the parliamentary level has been slowest and least effective."[4] Mallory later added that a "helpless and frustrated legislature may be a symptom that the public service has the process of government under good control but it is also a sign that steps should be taken to modernize the techniques of legislative scrutiny and criticism."[5]

J. A. Corry, also, has commented that Parliament is poorly equipped for the task of control:

> Every body of organization that tries to influence events equips itself with specialized committees, staff, and secretariats.

> Every body, that is, except legislatures . . . ! In our puzzling over legislative . . . control of administration, we have put too big a share of our attention on the rules and principles to be applied to the controlling and not enough on the organization needed to apply the rules and principles effectively.[6]

In this study, the inevitability of delegation by the Parliament of Canada is accepted. (Hereafter, the term "Parliament" will refer to the House of Commons and Senate--the legislative branch of government.) Furthermore, the basic assumption is that Parliament itself is the most suitable body to supervise the use made of delegated legislative authority. It is acknowledged that the cabinet, the bureaucracy, the courts, and interest groups play a part in this control. However, because it is Parliament which delegates the authority, and because supervision is essentially a political function (assuming that the legality of subordinate legislation is not in question), it is Parliament which should exercise control to ensure that subordinate legislation is consistent with Parliament's intention.

The main thesis of this study is that the machinery necessary for Parliament to perform its supervisory function has in the past been inadequate. Until recently, and apart from the general requirements that regulations be published and tabled, the only chances for scrutinizing subordinate legislation have been the normal debating opportunities.[7] Most important among these have been the consideration of bills and the estimates, question period, private members' time, and the budget and Throne speech debates. While these opportunities give considerable time for members to raise issues relative to enabling clauses and regulations made pursuant to them, it is submitted that this form of control is likely to be sporadic and of inconsistent quality. Furthermore, the very nature of most subordinate legislation is such that relatively few members of Parliament can reasonably be expected to have a sustained concern for its control. For this reason, some formal means of focusing this concern is needed.

In 1968 the House of Commons, recognizing the need to strengthen legislative control techniques, appointed the Special Committee on Statutory Instruments and instructed it to recommend procedures for Commons review of "instruments made in virtue of any statute of the Parliament of Canada."[8] Some action with respect to the Committee's recommendations has already been taken, and more is expected. Inasmuch as the whole question of control is now in a state of change, the present seems like an appropriate time to consider the problem.

In order that the thesis may be tested, answers to a number of questions must be sought. In the first place, how extensively does Parliament delegate authority? Second, what is the danger that this authority may be abused? Third, how well-equipped is Parliament to perform a supervisory function? Fourth, how interested do members of Parliament appear to be in performing this function? The following paragraphs indicate how this study is organized in the search for answers to these questions.

The study is concerned mainly with the powers given to the Governor-in-Council and to individual ministers. Although authority is delegated to other bodies as well, only those instances which subject the exercise of this power to cabinet or ministerial approval are considered. The others are omitted because they are more peripheral to the question of parliamentary control.

Chapter II consists of a survey of Government of Canada statutes-in-force on April 23, 1968, to determine the extent and some of the characteristics of delegated powers. Chapter III looks at the specific control provisions included in these statutes.

Parliament is only one agency which exercises control over subordinate legislation. In order that this scrutiny may be viewed within the broader framework of control, Chapters IV and V investigate the roles played by the executive branch of government (including the bureaucracy) and the courts.

Chapter VI studies the work of the Special Committee on Statutory Instruments.

The purpose of Chapter VII is to find out the extent to which members of Parliament have expressed concern about the delegation of power and its use. Is it true that "so long as the representative is not provided with instruments of ready control, he is likely to trust the official less and be the more tempted to interfere even in technical matters," and that "the freedom of the official depends on the assured mastery of the representative"?[9] Or are Canadian parliamentarians apathetic, more inclined to debate new bills rather than to wade through the more boring and more technical regulations made pursuant to old statutes?

An entire session was chosen so that the use made of all debating opportunities could be determined. The second session of the twenty-eighth parliament (1969-70) was selected for this case study because it was the first complete session which operated under the new

House of Commons rules, and because it predated implementation of the Statutory Instruments Committee's recommendations. Hopefully, conclusions based upon this session's activity will have more general application to Parliament.

Chapter VIII considers the actions taken by the Government and Parliament to strengthen control techniques, and the final chapter assesses these improvements in light of the need which this study has found to exist.

Before proceeding to these matters, however, brief consideration should be given to the broader question of the relationship between Parliament and cabinet, to the reasons for delegating authority, and to the meaning of "abuse."

A. The Legislature and the Executive

To view parliamentary control of subordinate legislation in proper perspective it is necessary to recognize that such control is but one aspect of the general question of parliamentary control of the executive--that is, one aspect of responsible government. While the purpose of this study is not the consideration of the broader question, that question must, nevertheless, be briefly discussed if the problem of subordinate legislation is to be clearly understood.

Before cohesive political parties developed in Canada about the time of the 1878 election,[10] and before the rise of what is generally described as the "positive state," the House of Commons (or the Assembly) could exercise much more effective control over the cabinet than it can today. Thus, the elective function of the House--the power to make and unmake Governments--was a reality.

The evolution of strong party organization and its main parliamentary manifestation of party discipline has strengthened the cabinet vis-à-vis the House of Commons. However, even with majority government it is unrealistic to suggest that responsibility has been reversed, for such a suggestion assumes completely docile Government backbenchers and a Government which is insensitive to public opinion insofar as that opinion is expressed by members of Parliament. Nevertheless, a large shift in power has occurred. Indeed, the term "prime ministerial government" is now with us and suggests a further transformation of the parliamentary system.

The vast expansion in the role of government, both to restrict individual pursuit of selfish ends and to create new social goals, is well known and need not be discussed here.[11] The result of this expansion and the accompanying increase in powers delegated to the executive branch has been to place much activity beyond the easy reach of Parliament.

Because responsible government is concerned with the direct relationship between the cabinet and the House of Commons, the strenghening of parties has made the enforcing of responsibility more difficult, agencies such as the caucus notwithstanding. Nevertheless, the strengthening of the cabinet through increased government activity has emphasized the growing need to ensure responsibility. An appropriate way to consider the relationship between legislature and executive is in terms of two principles basic to our form of government--the supremacy of parliament and the rule of law.[12] Parliamentary supremacy is discussed below; the rule of law is considered when the question of abuse is raised later in this Chapter.

The changing relationship between cabinet and Parliament has been the topic of continuing discussion. Nevertheless, there seems to be consensus that, in general terms, the function of the cabinet is to govern whereas the function of Parliament is to criticize when it feels that criticism is necessary. Understandably, most of the criticism comes from the opposition parties in the House of Commons. The main purpose of this criticism is not to defeat the Government but, rather, ultimately to persuade the electorate to replace the Government at the next election. It is true, of course, that the House of Commons can as a last resort force the Government's resignation or the dissolution of Parliament. However, even in a time of minority Government, this possibility may be remote if the party holding the balance of power expects no rise in its fortunes at the next election. Generally, then, this "last resort is . . . far, far away."[13]

Because this ultimate sanction is not especially meaningful in terms of the day-to-day business of government, there is continued concern about the relationship between the cabinet and the legislature, and the need to strengthen the role of Parliament. This concern has led to the adoption of a number of reforms by the House of Commons, such as the strengthening of the committee system, provision of research facilities for private members, changes in the rules generally and, most recently, implementation of many of the recommendations of the Special Committee on Statutory Instruments.

Commons committees have been strengthened chiefly by the transfer of the estimates and committee stage of bills to standing committees. Corry cautions against too much strengthening of committees at the expense of the cabinet, however, inasmuch as cabinet leadership is undoubtedly necessary.[14]

Another reform has been the provision of research facilities for private members on both sides of the House. The Honourable Mitchell Sharp suggested in 1964

> that there will have to be improvements in the functioning of parliamentary institutions themselves, in order to balance the influence of the experts in the government. In other words, that Parliament itself must be able to probe and be prepared to probe very much more deeply into the functioning of government itself.[15]

A modest beginning was made in 1969, but the amounts of money were small. Although no funds were initially provided to strengthen the role of the Government backbenchers, this situation was rectified the following year.[16]

A third area of reform has related to rules changes generally. T. A. Hockin notes that changes made since 1913 have worked "against the Opposition's supposed right to talk almost as long as it wants in all debates." [17] There is a fine distinction between legitimate criticism and obstructionism. The opposition must be permitted to oppose, but at the same time the Government must be permitted to get on with the job of governing. Agreement with the idea of balancing these potentially conflicting interests may be easy, but applying it is most difficult. In Jennings' words,

> The Government tends to regard the Opposition as the brake on a car going uphill; whereas the Opposition thinks that the car is going downhill. 'Uphill' and 'downhill' are terms relative to some notion of 'level' and there is no recognised standard

> by which the impartial person, if there were such a person, could determine his conclusions.[18]

The opposition is most jealous of its right to criticize, so whenever it feels this right being challenged it is quick to react. Speaking in the Canadian House of Commons in 1942, the Right Honourable J. L. Ilsley noted that "if the Government starts to crowd the House, the House crowds the Government. The moment we indicate to the House that we want to get ahead, we simply precipitate speeches about the right of the House of Commons to discuss matters and discuss them thoroughly."[19] The application of closure during the 1956 pipeline debate caused one of the best-remembered opposition outcries. Perhaps the best recent example was the threat felt by the opposition when Standing Order 75(c) was proposed, and adopted only by the use of closure on July 24, 1969. In essence, that Standing Order provides that if all or a majority of House leaders cannot agree (under S. O. 75[a] or [b]) upon a time limit for the debate of a bill, the Government may, after giving notice, propose an allocation-of-time order for each stage of debate. This order is debatable for two hours. Mallory has referred to the forcing through of this Standing Order as "a brutal use of majority power."[20] The Honourable Donald Macdonald, who was Government House Leader at the time, naturally has a different interpretation: the defect of 75(c) "may be that it contains so many safeguards, so much due process, that it will not be effective against obdurate opposition."[21]

The rules governing the operation of the House of Commons are of great importance in establishing the delicate legislature-executive power balance inasmuch as they provide a number of weapons for the opposition--from the right to ask questions daily, through debate of motions of various kinds, to the non-confidence motion itself.[22] But are these opportunities adequate to force executive accountability to the House of Commons, specifically with respect to the exercise of delegated power? If an important function of Parliament is criticism, then there must be adequate provision for its performance. A fourth reform has therefore been the recent implementation of many of the recommendations of the Special Committee on Statutory Instruments. These recommendations and their implementation are discussed in Chapters VI and VIII.

What impact have the strengthening of party organization and the increase in government activity had on the doctrine of parliamentary supremacy? Dicey has expressed the accepted meaning of "parliamentary supremacy," at least for the United Kingdom, as follows: Parliament has "the right to make or unmake any law whatever; and, further, . . . no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[23] The operation of this doctrine in Canada is limited by the distribution of powers in the British North America Act.

While the growth of party organization and government activity have left unimpaired the power of Parliament (in the sense that Dicey uses the term "Parliament"), they have greatly shifted the locus of that power from the House of Commons to the cabinet. In one sense, therefore, the principle of parliamentary supremacy means something quite different today from what it meant a century ago. All members of

Parliament must have access to the means whereby they can understand government policy and administration, for "parliamentary supremacy" has little meaning if members are unaware of what they are approving.

It is seen, therefore, that the question of an appropriate relationship between cabinet and Parliament involves the whole matter of parliamentary reform. One area where the executive and legislature run into each other is that of subordinate legislation and its control.

Delegation of power by the legislature is inevitable, and is indeed desirable "for certain purposes, within certain limits, and under certain safeguards."[24] Corry acknowledges that subordinate legislation "still has its defects and crudities," but he is convinced that "it is the most hopeful method for making new law quickly and in detail."[25] The problem is therefore one of determining how the exercise of delegated power can be controlled rather than of finding ways of eliminating or reducing it. (This is not, however, to suggest that power should be delegated without the establishment of need in each instance.) The present study seeks to determine the adequacy of control techniques.

B. Reasons for the Delegation of Power

The reasons for delegation are well known, but they should briefly be noted here.[26] In the first place, legislatures have insufficient time to deal with both the vast amount of detail and the main principles or policy. A choice must be made, but there nonetheless remains the problem of distinguishing between detail and principle.[27]

Second, the increasingly technical nature of legislation reduces the competence of legislators to discuss it adequately. While this argument contains much truth, care must be taken not to underestimate the ability of individual legislators to grapple with technical issues. We shall be in grave danger once we assume that legislators cannot be expected to understand the intricacies of legislation.

Third, there exist contingencies for which statutory provision cannot be made except to leave them to regulations.

> It is easy to prohibit in general terms when you know precisely what you want to discourage. It is impossible to ensure the building of something new for the first time by commanding it in advance in general terms. The desired result can be visualized but the means of reaching it must be determined by the obstacles encountered in daily administration. The path of these new experiments cut across vested rights and the long-cherished dogmas of the common law and the sources of legal obstruction could not be foreseen.[28]

A fourth reason is to permit flexibility. Subordinate legislation "permits of the rapid utilisation of experience, and enables the results of consultation with interests affected by the operation of new Acts to be translated into practice."[29]

Fifth, it enables action to be taken in time of emergency. The provisions of the War Measures Act constitute the most striking example in Canada.

Jennings, quoting evidence given to the British House of Commons Committee on Ministers' Powers, suggests a sixth reason which stresses an alleged "superiority in form which . . . delegated legislation has over Statutes."

> Statutory Rules can be prepared in comparative leisure and their subject matter can be arranged in a logical and intelligible shape uncontrolled by the exigencies of Parliamentary procedure and the necessity for that compression which every Minister . . . invariably requires in the case of a Bill.[30]

Some of these reasons are of more general application than others, but no matter how compelling the justification for subordinate legislation, without sufficient control mechanisms abuse is possible. How great is the danger that delegated power might be abused?

C. The Problem of Abuse

The degree to which delegated power can be abused depends upon answers to several questions. The most obvious of these is, "What does abuse mean?" Other questions, which are considered in later chapters, include: "How broad are the delegated powers?"[31] "What control mechanisms exist, whether in the hands of Parliament, the cabinet, the bureaucracy, the courts, or interest groups?"

The present section considers the problem of defining the term "abuse." Attempts at definition lead to the use of such normative terminology as "to use wrongly; misuse," or "wrong, bad, or excessive use."[32]

Perhaps the basic fear which is associated with the word, as it applies to subordinate legislation, is that "expert civil servants may become the masters of the people they are employed to serve."[33] More immediately, it relates to the often sweeping and loosely defined powers delegated to the executive, thus making difficult the determination of the intended, as well as the legal, boundaries of action.

In J. E. Kersell's view,

> Government officials are inevitably disposed to "get on with the job" and to avoid interference whenever possible. They have long experience, highly skilled techniques, and they believe they know best how to carry out an allotted task. They may develop a natural impatience of restraint once broad objectives have been determined, especially of that kind of restraint which seems to attach more importance to means than to ends, and to form than to substance.[34]

This attitude, when combined with the following argument, is most disturbing. According to Friedrich,

> throughout the length and breadth of our technical civilization there is arising a type of responsibility on the part of the permanent administrator . . . which cannot be effectively enforced except by fellow-technicians who are capable of judging his policy in terms of the scientific knowledge bearing upon it.[35]

No one doubts the difficulty which technology creates for the layman whose job is to control the technician, but an avowed denial of this kind of control flies in the face of the principles of political democracy. Friedrich's opinion is unacceptable, but if it is correct then the democratic process is in serious trouble. Finer reminds us that "virtue itself hath need of limits." "Moral responsibility is likely to operate in direct proportion to the strictness and efficiency of political responsibility," he suggests, "and to fall away into all sorts of perversions when the latter is weakly enforced."[36]

Furthermore, cabinet or ministerial control over civil servants is insufficient for the requirements of democracy, and yet Prime Minister St. Laurent came close to suggesting that it was sufficient, during the second reading debate of the Regulations Bill in 1950. Surprisingly, he was not challenged by opposition speakers.[37] Discussion in the privacy of the cabinet chamber is rarely a satisfactory substitute for debate in public view.

The best known and probably the most vehement critic of subordinate legislation was Lord Hewart of Bury who in 1929 claimed that Parliament was being duped into creating a "new despotism."[38] Five years later, Ontario's Chief Justice Sir William Mulock expressed a similar point of view.[39] However, these extreme views are rare and have frequently been criticized.[40] It should be possible not only to understand the reasons for delegating authority, but also to realize that delegation may have to be further extended.

If the practice of delegating power is itself not an abuse, where is the meaning to be found? If an authority to whom power has been delegated acts beyond his legal bounds, he may be said to have abused his power. But surely abuse is not a function solely of legality, because in the making of laws, legislatures cannot anticipate every legal action.

In jurisdictions where legislative committees have been empowered to scrutinize subordinate legislation, the committees' terms of reference have been intended to help detect possible abuse. The following scrutiny criteria have been drawn from a number of jurisdictions, but they closely resemble those established for the British House of Commons Select Committee on Statutory Instruments.[41]

Scrutiny committees give special attention to subordinate legislation which (1) imposes a tax, or a charge on the public revenues, (2) imposes a penalty, especially if no maximum is specified in the enabling legislation, (3) contains substantive legislation "that should be enacted by the Legislature,"[42] (4) is intended to be immune from challenge in the courts, (5) makes some unusual or unexpected use of delegated powers, (6) has retroactive effect, (7) has not been properly promulgated (with respect to tabling or publishing, for example), (8) appears to be beyond the scope of the enabling Act, (9) "trespasses unduly on personal rights and liberties,"[43] or (10) for any reason needs clarification.

These criteria do not, however, define the term "abuse"; rather, they suggest some of the circumstances under which special surveillance is required in order that something called "abuse" might be avoided. Perhaps this is as near as one can come to a definition.

Closely related to the question of abuse is the controversy surrounding the status of the rule of law. While a precise meaning cannot easily be attached to this principle, its essence may be stated as "the restriction on arbitrary authority in government and the necessity for all acts of government to be authorized by 'reasonably precise' laws as applied and interpreted by the courts."[44] The threat to this principle comes from the expanding role of government and the increasing grants of discretionary power to government officials, inasmuch as the limit to discretionary power is frequently difficult to determine. However, in the absence of an "arithmetical or statistical test for the presence of the Rule of Law,"[45] it would be impossible to determine the stage at which that rule disappears. This writer agrees with Dawson, however, that despite the inroads on the rule of law which have resulted from increased delegation of authority, this principle is "a sturdy bulwark against abuse of power."[46]

D. Problems of Terminology

In a study such as this, there are some significant problems of terminology. The study is concerned about control of subordinate "legislation"; the requirements of the Regulations Act, and to a lesser extent those of the Statutory Instruments Act,[47] have applied to instruments having "legislative" effect. However, Parliament delegates power which relates to daily administrative decisions as well as power which is clearly legislative in nature. There is some difficulty in distinguishing between legislative and administrative authority; indeed evidence presented to the House of Commons Special Committee on Statutory Instruments indicates that there is disagreement within the bureaucracy on this point.[48] Even the courts have been unable to give precise meaning to the term "legislative."[49]

The problem is aggravated by the variety of terms used to delegate legislative authority. The Regulations Act, for example, defined "regulation" to include certain rules, orders, by-laws, proclamations and, of course, regulations (s. 2); the Statutory Instruments Act includes as a "regulation" almost any document which is of a legislative nature (s. 2[1][b], [d]). Furthermore, the same term ("order") has been used in the delegation of both legislative and other types of authority.[50]

Seldom is there confusion when an Act authorizes the making of "regulations," but many statutes delegate power to "prescribe," "require," "exempt," "direct," "prohibit," and so on, without specifying the instruments to be used. In these cases, the difficulty determining whether the power exercised is legislative or not is compounded.

In spite of the fact that this study is concerned primarily with subordinate legislation, it seems apparent that an attempt to establish criteria for identifying delegations of "legislative" power would be futile. For this reason, and to avoid the necessity of repeated explanation, the present study uses the terms "regulations," "subordinate legislation," and "statutory instruments" to refer to the exercise of delegated power generally, except where the context requires that finer distinctions be made.

In any event, the following note of caution sounded by the Committee on Ministers' Powers is pertinent:

> But just because legislative and administrative functions overlap, it is dangerous to allow oneself to be guided too much by the name. No doubt a large proportion of the regulations made by Ministers under statutory authority are intimately concerned with administration, and often constitute, wholly or mainly, codes of mere executive orders. And yet to take any set of regulations and conclude that, because they are primarily "administrative," they can be disregarded as having no legislative aspect may often be wrong. Indeed to exclude "administrative" regulations from any system of safeguards to be adopted in regard to delegated legislation would be dangerous; for to do so might let in the very evils against which safeguards are designed.[51]

Another area of possible confusion pertains to the terms "subordinate legislation" and "delegated legislation." These are generally treated as being synonymous although, as Kersell points out, the latter term can be applied to both enabling legislation and the regulations made pursuant to that legislation.[52] In the present study, "subordinate legislation" is used because it more clearly suggests the distinction between statutes and regulations.

Footnotes

[1] Louis L. Jaffe, Judicial Control of Administrative Action (Boston: Little, Brown and Company, 1965), p. 33.

[2] Cecil Carr, Delegated Legislation, 1921, p. 2, quoted in Great Britain, Parliament, Parliamentary Papers, 1932, Cmd. 4060,"Report of Committee on Ministers' Powers," pp. 15-16. (This Paper is hereinafter referred to as "Report of Committee on Ministers' Powers.")

[3] Immigration Act, Revised Statutes of Canada, 1952, c. 325, s. 61(g)(iv). Both J. C. Morrison (Director General of Operations) and E. P. Beasley (Director, Home Services Branch, Immigration) of the Department of Manpower and Immigration agreed that most refusals of potential immigrants are based on failure to satisfy conditions specified in the regulations rather than those contained in the Act itself. (Canada, Parliament, House of Commons, Special Committee on Statutory Instruments, 1968-69, Minutes of Proceedings and Evidence, June 26, 1969, pp. 178-179. These Minutes are hereinafter referred to as Statutory Instruments Committee, Minutes.)

The best example of a broad delegation of legislative power is the War Measures Act (R. S. C. 1952, c. 288), although the operation of this Act is limited (s. 3[1]) to periods of "real or apprehended war, invasion or insurrection."

Later references to Revised Statutes of Canada and Statutes of Canada are to R. S. C. and S. C.

[4] J. R. Mallory, "Delegated Legislation in Canada: Recent Changes in Machinery," Canadian Journal of Economics and Political Science, XIX (1953), 462-463.

[5] J. R. Mallory, "The Uses of Legislative Committees," Canadian Public Administration, VI (1963), 4.

[6] J. A. Corry, "The Administrative Process and the Rule of Law," in Bureaucracy in Canadian Government, ed. by W. D. K. Kernaghan (Toronto: Methuen, 1969), p. 178.

[7] For a discussion of this question, see John E. Kersell, Parliamentary Supervision of Delegated Legislation (London: Stevens & Sons Limited, 1960). Most of Kersell's chapters contain sections describing Canadian practice.

[8] Canada, Parliament, House of Commons Debates (hereinafter referred to as H. of C. Debates), September 24 and 30, 1968, pp. 438 and 587. (Page references to the House of Commons and Senate debates of the twenty-eighth and twenty-ninth parliaments [1968-69 and later sessions] are to the daily issues.)

[9] J. E. Hodgetts, "The Civil Service and Policy Formation," in Canadian Public Administration: A Book of Readings, ed. by J. E. Hodgetts and D. C. Corbett (Toronto: Macmillan Company of Canada Limited, 1960), pp. 444-445, n. 13, quoting I. G. Gibbon, "The Official and his Authority," Public Administration, IV (1926), 93.

[10] Thomas A. Hockin, "Adversary Politics and Some Functions of the Canadian House of Commons," in The Canadian Political Process, ed. by Orest Kruhlak, Richard Schultz and Sidney Pobihushchy (Toronto: Holt, Rinehart & Winston of Canada, Limited, 1973), pp. 362-363.

[11] For a discussion of the broadened role of government see, for example, J. A. Corry and J. E. Hodgetts, Democratic Government and Politics (Toronto: University of Toronto Press, 1959), ch. 5.

[12] E. C. S. Wade claims that these two principles can "only with some difficulty" be reconciled with the rise of cohesive parties and the positive state. (A. V. Dicey, Introduction to the Study of the Law of the Constitution, with an Introduction by E. C. S. Wade [London: Macmillan & Co. Ltd., 1962], p. xxi.)

[13] Ivor Jennings, Parliament (Cambridge: Cambridge University Press, 1957), p. 7. Crick echoes Jennings' opinion: "Control means influence, not direct power; advice, not command; criticism, not obstruction; scrutiny, not initiation; and publicity, not secrecy." He adds that "the phrase 'Parliamentary control,' and talk about the 'decline of Parliamentary control,' should not mislead anyone into asking for a situation in which Governments can have their legislation changed or defeated, or their life terminated." (Bernard Crick, "What do we Mean by Control?" in Parliament and the Executive: An Analysis with Readings, ed. by H. V. Wiseman [London: Routledge & Kegan Paul, 1966], pp. 138-139.)

[14] J. A. Corry, "Adaptation of Parliamentary Processes to the Modern State," Canadian Journal of Economics and Political Science, XX (1954), 7. He is keenly aware of the dilemma when he adds that the problem is not to find ways of strengthening the House to challenge the cabinet, but "is rather to find ways in which the House of Commons as a whole can be equipped to participate more effectively in the extraordinarily complex process of governing, to discover counterpoises to a strong cabinet heavily armoured with expertise." (P. 8.) One wonders if Corry wishes both to have his cake and to eat it.

[15] Hon. Mitchell Sharp, "The Expert, the Politician, and the Public," in Order and Good Government, ed. by G. Hawkins (Toronto: Canadian Institute of Public Affairs, 1965), pp. 82-83. At the time, Mr. Sharp was Minister of Trade and Commerce. He had formerly been Deputy Minister of that Department.

[16] The amount for the official Opposition was $125,000; for the N. D. P., $35,000; and for the Ralliement des Creditistes, $35,000.

In 1970, Government backbenchers received $130,000. (Edwin R. Black, "Opposition Research: Some Theories and Practice," Canadian Public Administration, XV [1972], 25, 28.)

[17] Hockin, "Adversary Politics," p. 365.

[18] Jennings, Parliament, p. 167.

[19] H. of C. Debates, May 26, 1942, p. 2774.

[20] J. R. Mallory, The Structure of Canadian Government (Toronto: Macmillan of Canada, 1971), pp. 268-269.

[21] Donald S. Macdonald, "Changes in the House of Commons--New Rules," Canadian Public Administration, XIII (1970), 38.

[22] See, for example, R. MacGregor Dawson, The Government of Canada, revised by Norman Ward (Toronto: University of Toronto Press, 1970), Chapter 19, for a brief discussion of the major opposition techniques.

[23] Dicey, The Law of the Constitution, p. 40. Laws are, of course, subject to interpretation by the courts.

[24] "Report of Committee on Ministers' Powers," p. 51.

[25] J. A. Corry, Law and Policy (n. p.: Clarke, Irwin & Company Limited, 1959), p. 65.

[26] See, for example, the "Report of Committee on Ministers' Powers," pp. 51-53; also, the remarks of A. D. Arthurs and John Turner before the Statutory Instruments Committee, (Minutes, April 22 and June 27, 1969, pp. 10-12 and 227-229.)

[27] It must be recognized that there are levels of policy formation--that something cannot be categorized as either policy or non-policy. Hodgetts suggests that failure to distinguish between these levels can "lead to unwarranted criticism of civil servants for making choices which they may be quite entitled to make or unable to evade." (Hodgetts, "The Civil Service," p. 441.)

R. G. Robertson, Clerk of the Privy Council and Secretary to the Cabinet of the Government of Canada, asserts that "any civil servant above clerical or stenographic grades who has spent any substantial time in a job without contributing to some degree to the policy he administers should be fired." He claims that any attempt to make a policy-making policy-implementing distinction between ministers and civil servants is "nonsense." (R. G. Robertson, "The Canadian Parliament and Cabinet in the Face of Modern Demands," Canadian Public Administration, XI [1968], 272.)

[28] J. A. Corry, "Administrative Law in Canada," Papers and Proceedings of the Fifth Annual Meeting of the Canadian Political Science Association, V (1933), 191-192.

In a classic statement for an opposition member of Parliament, David Lewis criticized the 1966-67 Public Service Staff Relations Bill (C-170) for containing too much detail: "Too many t's are crossed and too many i's are dotted. There is too little discretion left to the board, and too little room for applying changing conditions. Everything is codified in a way which is likely to cause a great deal of difficulty in the actual, practical working out of this kind of legislation." (H. of C. Debates, May 31, 1966, p. 5798.) However, it must be remembered that Mr. Lewis was speaking from "some years of experience" in labour relations.

[29] "Report of Committee on Ministers' Powers," p. 51.

[30] Jennings, Parliament, p. 479, quoting Sir William Graham-Harrison, First Parliamentary Counsel to the Treasury in Great Britain, in Committee on Ministers' Powers, Minutes of Evidence, p. 35.

[31] Note, for example, this comment which Justice Minister Turner made to the Statutory Instruments Committee: "Judicial review is important. Parliamentary review, I believe, is important. . . . But those are ex post facto remedies. You are chasing after something that has been done, and maybe a grievance has been caused. There may be an injustice done. I believe you cannot look at those aspects of it unless you look at the granting power and the scope of the granting power itself." (Minutes, June 29, 1969, p. 229.)

[32] Webster's New World Dictionary, College Edition, 1956. The Oxford International Dictionary, 1957, says basically the same thing.

[33] Kersell, Parliamentary Supervision, p. 1. It must be recognized that delegation of authority to ministers and to the cabinet is usually de facto delegation to civil servants.

[34] Ibid., p. 2.

[35] C. J. Friedrich, "The Nature of Administrative Responsibility," in Basic Issues in Public Administration, ed. by Donald C. Rowat (New York: Macmillan Company, 1961), p. 463. Friedrich combines with this a plea for discarding official anonymity of civil servants. (P. 465.) The lip service which he pays to the need for political responsibility (p. 463) falls flat in the light of this quotation.

[36] Herman Finer, "The Case for Subservience," in Basic Issues, ed. by Rowat, pp. 469, 472. He suggests that "the people can be unwise but cannot be wrong." (P. 470.) Corry believes that we do not need to fear "the overweening ambition of the Ottawa official nearly

as much as our own general indifference." ("Administrative Law in Canada," p. 207.)

[37] The Prime Minister said "We do not believe we should recommend at this time that sort of committee [similar to the British House of Commons Select Committee on Statutory Instruments] because most of the statutory regulations have to be made by the governor in council, and that gives considerable time for checking." (H. of C. Debates, May 31, 1950, p. 3040. See also June 12, 1950, pp. 3494-3501, for comments by the two main opposition speakers, E. D. Fulton and Stanley Knowles.)

[38] Lord Hewart, The New Despotism (London: Ernest Benn Limited, 1929). See, for example, pp. 16-17.

[39] Wm. Mulock, "Address to Ontario Members of the Canadian Bar Association," Canadian Bar Review, XII (1934), 38.

[40] See, for example, Corry, "Administrative Law in Canada," p. 190, and "Report of Committee on Ministers' Powers," pp. 4-5.

[41] The jurisdictions cited are the following:
(1) Great Britain (House of Commons Select Committee on Statutory Instruments, established 1944). See Kersell, Parliamentary Supervision, pp. 47-48.
(2) Great Britain (House of Lords Special Orders Committee, established 1925). This Committee considers only instruments requiring affirmative resolution. See Kersell, Parliamentary Supervision, p. 29.
(3) Australia (Senate Standing Committee on Regulations and Ordinances, established 1932). See Kersell, Parliamentary Supervision, pp. 32-33.
(4) Manitoba (Standing Committee on Statutory Regulations and Orders, established 1960). See Statutory Instruments Committee, Minutes, May 15, 1969, pp. 106-107.
(5) Saskatchewan (Special Committee on Regulations, established 1964). See Statutory Instruments Committee, Minutes, May 15, 1969, p. 117.

[42] From the Manitoba terms of reference. Included in this item would be subordinate legislation which raises matters of policy or principle.

[43] From the Australian terms of reference.

44 Dawson, The Government of Canada, p. 73.

[45] J. A. Corry, "The Prospects for the Rule of Law," Canadian Journal of Economics and Political Science, XXI (1955), 406.

[46] Dawson, The Government of Canada, p. 73.

[47] R. S. C., 1952, c. 235; S. C., 1971, c. 38. These two sta-

tutes and their regulations appear as Appendices A and B to this study.

[48] See, for example, the testimony of personnel from the Department of Manpower and Immigration. (Minutes, June 29, 1969, pp. 194-202); also, the comments of Mr. Paul Beseau, Legal Adviser to the Privy Council Office, that certain Department of Transport publications "are likely regulations within the meaning of the Regulations Act, but I do not get them to review." (Minutes, June 26, 1969, pp. 223-224.)

The term "statutory instruments" is uncommon in Canada. J. W. Morden, Assistant Counsel to the Statutory Instruments Committee, found no Statute of Canada which used the term. (This was, of course, before the Statutory Instruments Act was passed.) Also, there seems to have been no explanation for the choice of the Committee's name. The term "statutory instrument" is, however, commonly used in Great Britain where, says Morden, "it means, generally, subordinate legislation." (Morden, "Survey of Canadian Law and Practice Respecting Subordinate Legislation," Statutory Instruments Committee, Exhibit RR, 1969, pp. 1-2.)

[49] See below, Chapter V.

[50] Canada, Parliament, House of Commons, Special Committee on Statutory Instruments, 1968-69, Third Report, 1969, p. 12. (Hereinafter referred to as Statutory Instruments Committee, Third Report.)

[51] "Report of Committee on Ministers' Powers," p. 19.

[52] John E. Kersell, "Parliamentary Supervision of the Exercise of Delegated Legislative Powers," (unpublished Ph. D. dissertation, London School of Economics and Political Science, 1958), pp. 13-14.

CHAPTER II

EXTENT OF DELEGATION BY THE STATUTES OF CANADA

The Statutes of Canada delegate regulation-making authority to many recipients. Most power is delegated in objective terms, but some is expressed subjectively. Most authority is specific, but some is much more general. Some of the characteristics of delegated power have been criticized as being undesirable. This Chapter attempts to show the magnitude of delegation in the statutes in force as of April 23, 1968. A prior step, therefore, has been to estimate the number of these statutes.

Although there were 783 entries in the "Table of Public Statutes, 1907 to 1967-68,"[1] exclusive of cross-references, this figure had to be altered by at least ten factors before a more accurate count of statutes could be made. For a discussion of these factors see Appendix C. After these ten factors were considered as indicated in the Appendix, the revised estimate of statutes in force in 1967-68 was 679. Of these, 417 (61 per cent) delegated authority.[2]

A. Significant Characteristics of Delegated Power

Knowledge of the number of Acts which delegate power is not particularly useful unless it is accompanied by an understanding of who the recipients of this power are, and what kind of power is delegated.

It should be understood that in arriving at the numbers which appear in the following sections, some instances of delegation (especially when delegation was implied)[3] may have been overlooked; and that the classifying of delegated power involved the exercise of judgement. Nevertheless, the following summary does indicate the major characteristics of delegated authority and that, after all, is the purpose of this discussion.

1. Recipients of Delegated Power

Power to make regulations was delegated most frequently to the Governor-in-Council.[4] A total of 244 Acts delegated authority solely to the cabinet, and another 87 to the cabinet plus some other agent. Of these 331 statutes (representing 79 per cent of the 417 Acts which delegated power), 23 required that cabinet regulations be made upon the recommendation of a minister or the Treasury Board, 4 that they carry the recommendation of two ministers, and 7 that they have the concurrence of some other authority.[5]

The frequency of delegation to individual ministers (including the Treasury Board) is shown in Table 1. (The titles are listed as they appeared in the enabling acts.) Regulations under seventeen of the eighty-two Acts represented in this Table required cabinet approval.

Seventy-eight statutes delegated authority, requiring cabinet or ministerial approval for its exercise, to agencies of the Government of Canada (fifty-two Acts) or to other bodies (twenty-six Acts, fifteen of them pertaining to harbour commissions). In addition, the Speakers of the two houses of Parliament could make regulations, "subject to the approval of the two houses," for the government of the Library of Parliament.[6] Finally, the Senate and House of Commons Act authorized the two houses to "make regulations . . . by rule or by order, rendering more stringent upon its own members the provisions of this Act that relate to attendance of members or to deductions to be made from the sessional allowance."[7]

TABLE 1

FREQUENCY OF DELEGATION TO INDIVIDUAL MINISTERS
(1967-68 ACTS-IN-FORCE)

Minister	Number of Statutes[a]		
	Sole Recipient	One of at Least Two Recipients	Total
Agriculture	9	7	16
Citizenship and Immigration (Manpower and Immigration)	. .	3	3
Defense Production	. .	2	2
Finance	. .	4	4
Fisheries	. .	1	1
Interior	. .	1	1
Justice	. .	1	1
Labour	1	3	4
Mines and Technical Surveys	. .	1	1
National Defense	1	2	3
National Health and Welfare	. .	4	4
National Revenue	20	5	25
Postmaster General	1	. .	1
Registrar General	2	1	3
Resources and Development	. .	1	1
Secretary of State	2	1	3
Trade and Commerce	. .	1	1
Transport	. .	5	5
Treasury Board	1	3	4
Veterans Affairs	1	2	3

[a]Each of four Acts delegated power to two ministers. This explains why there are eighty-six Acts in the "Total" column representing eighty-two different statutes.

Why was the Governor-in-Council the main recipient of delegated power? Perhaps it was "deep-seated habit" and the "character of Cabinet Government in Canada, with its recognition at every turn of the importance of collective decisions by bodies which embody sectional interests."[8] Hopefully it was not, as J. W. Morden seems to suggest, that the cabinet "is a more difficult target to reach than an individual Minister and therefore [that] there is, in effect, some dilution of responsibility involved when the Cabinet makes a regulation."[9]

D. S. Thorson, Deputy Minister of Justice, maintains that a judgement is made in each case when a subordinate law-making body is chosen, and that the Governor-in-Council is selected when "the substance of the regulations have substantial policy implications" whereas a minister or other body is chosen when regulations are of a technical nature.[10] The validity of this assertion depends, of course, upon the criteria for distinguishing between policy and non-policy.

Probably of greater import than the recipients of delegated power, however, is the nature of the power.

2. Authority to Subdelegate Power

To some extent a discussion of the subdelegation of authority is purely academic inasmuch as de facto delegation by ministers to their subordinates, and no doubt by cabinet to individual ministers, is an acknowledged and irreversible fact of modern government. However, regulations which expressly authorize subdelegation are in a different category. Mr. Paul Beseau, former Legal Adviser to the Privy Council Office, stated that in his review of draft regulations he rejected as ultra vires any subdelegation which lacked expressed statutory authority.[11]

Approximately thirty-two Acts permitted power to be redelegated, and in one of these the power to subdelegate was itself passed on.[12] Although opinions differ as to the extent to which subdelegation should be authorized by Parliament,[13] it would seem desirable at least that such authorization be explicit, and that the recipient of redelegated power be identified. Several statutes, however, permitted an authority to "do and authorize," or otherwise permitted subdelegation to an unspecified person or body.[14]

Table 2 summarizes the instances of statutory provision for subdelegation.

TABLE 2

FREQUENCY OF AUTHORITY TO SUBDELEGATE
(1967-68 ACTS-IN-FORCE)

Recipient of Power to Subdelegate	Recipient of Redelegated Power (Number of Instances)			
	As Stated Below	Other Body	Unspecified	Total
Governor-in-Council	Minister (including Treasury Board) 6	5	6	17
Minister (including Treasury Board)	Department Officer 8	4	3	15
Other bodies	Committee of Body Itself or Subordinate Authority 4	1	3	8

3. Authority to Make Regulations having Retroactive Effect

No statute permitted the making of subordinate legislation which was retroactive to a date before it was made. However, three Acts expressly authorized the Governor-in-Council to make regulations effective on a date prior to their publication, and these regulations may be viewed as having retroactivity inasmuch as their effectiveness would precede public knowledge of them.[15]

The infrequency of this power is doubtlessly a reflection of its general undesirability. The Regulations Act, for example, provided (s. 6[3][a]) some protection for individuals against conviction resulting from the contravention of a regulation that had not been published in the Canada Gazette. The Statutory Instruments Act strengthens that protection (s. 11[2]). Mr. Thorson told the Statutory Instruments Committee that the granting of power to make retroactive regulations was "very carefully considered . . . [and] not lightly bestowed."[16] Mr. Beseau commented that he viewed as ultra vires any regulation having retroactive effect "unless it is especially authorized under an enabling section."[17]

4. Authority to Impose Penalties for Contravention of Regulations

Sixty Acts delegated authority to impose penalties (generally fines and/or imprisonment) for the violation of regulations. Table 3 summarizes these delegations.

There is no apparent basis for distinguishing between the twenty-six statutes which prescribed the type and maximum penalties which could be imposed by the cabinet, and the nine which did not, although five of the nine implemented international agreements (three of which provided that regulations must be tabled in Parliament).

TABLE 3

FREQUENCY OF AUTHORITY TO IMPOSE PENALTIES (1967-68 ACTS-IN-FORCE)

Recipient of Authority	Number of Statutes	Type of Penalty Prescribed		Maximum Penalty Prescribed	
		Yes	No	Yes	No
Governor-in-Council	35	26	9[a]	26	9[a]
Minister	3	3	. .	3	. .
Other bodies	21[b]	19[b]	2[c]	18[b]	3[d]
Not specified	1[e]	1	. .	1	. .

[a] In each of two of these Acts, one delegation prescribed the type and maximum whereas another delegation did not.

[b] Fourteen of these Acts pertained to harbour commissions.

[c] Railway Act (R. S. C., 1952, c. 234, ss. 34[3], 35[1]), and Boards of Trade Act (R. S. C., c. 18, s. 22[b]).

[d] Unemployment Insurance Act (S. C., 1955, c. 50, s. 43[1]), in addition to the two statutes in note c.

[e] National Battlefields at Quebec Act (S. C., 1908, c. 57, s. 4[2]).

Two unique provisions are noteworthy: the Governor-in-Council might under the Public Works Act prescribe penalties "until Parliament otherwise provides," and the Vancouver Harbour Commissioners Act stated that imprisonment in default of the payment of a fine would be "with hard labour."[18]

A strong case can be made against delegating authority to impose penalties, especially if the determination of guilt and assessment of the penalty do not have to be in accordance with judicial procedures. Not only do such delegations invite arbitrariness, but also there is usually no provision for appeal from the decisions. On the other hand, with the steady increase in the number of regulations, there clearly is need for some flexibility in imposing penalties. Because some discretion seems unavoidable, a reasonable compromise is the specifying, in the Act, of the type and maximum penalty which may be imposed. Fortunately, authority to impose penalties without stated maxima was not frequently bestowed, but we might ask whether such authority has any justification at all.

An alternative is for Parliament to prescribe the exact amounts of penalty. However, this is undesirable if the effect is to eliminate the flexibility necessary to ensure that punishment fits the crime.

5. Authority to Levy a Charge Payable to a Public Body or to Impose a Charge on the Public Revenue

The right of Parliament to control the purse strings is one of its oldest prerogatives. Although the struggle over the purse was initially between King and the House of Commons (in Great Britain), its modern manifestation is in terms of the cabinet and Commons. (The Canadian Senate plays a minor role.) The two basic principles in parliamentary control of finance are, first, that "the executive should have no income which is not granted to it, or otherwise sanctioned, by Parliament," and second, that "the executive should make no expenditures except those approved by Parliament, in ways approved by Parliament."[19] Elaborate machinery has been established, especially by the House of Commons, in the attempt to control or at least to maintain a watchful eye on the executive.

While the delegation of power to raise or spend money can be defended in terms of the arguments supporting subordinate legislation generally, Parliament should, if it is to be as vigilant as possible, avoid the delegation of power to tax and to make expenditures other than routine payments. The following discussion shows, however, that Parliament has not consistently done so.

(a) Authority to Levy a Charge Payable to a Public Body

At least thirty Acts permitted, frequently without stated maxima, the levying of charges payable to the Government of Canada or to an agent of it. In most instances these charges were to take the form of tolls or fees levied in return for services, but in five cases the right to tax was given to the Governor-in-Council.[20]

The Income Tax Act empowered the cabinet, upon the recommendation of the ministers of Finance and National Revenue, to "provide for the determination of the amount of tax to be paid by a person who was a member of the naval, army or air forces of Canada . . . during a taxation year in lieu of the tax otherwise payable under this Part." However, the Act contained the rates for computing the tax. The Indian Act stated that regulations may provide for "the taxation, control and destruction of dogs." No limit was mentioned. Under the Customs Act the Governor-in-Council had limited authority to determine the value for duty of certain goods. And the Export Act delegated limited power to impose export duties.

The broadest delegation of taxing power was contained in the National Parks Act which permitted the cabinet, as it "deems expedient," to tax "any residents of a Park or . . . the interest of any persons in land in a Park" to help defray the cost of health, welfare, and hospital services provided to Park residents by a provincial government; and to tax "the interest of any person in land in a Park" to help pay for public works and utilities. No maxima were stated, and there was no indication of the method to be used for calculating the taxes.

The recipient of power to levy charges was generally the Governor-in-Council, but individual ministers, the Canadian Transport Commission, the Board of Grain Commissioners, and (as subdelegated by the cabinet) a provincial marketing board also received this authority.

(b) Authority to Impose a Charge on the Public Revenue

Twenty-two statutes authorized the imposition of charges on the public revenue, eighteen of them by the Governor-in-Council, one by the Minister of Finance, one by the Treasury Board, one by the Salt Fish Board, and one by the Canadian Radio-Television Commission. There was variety in the types of charges authorized, including the establishment of rates of pay and allowances, pensions, subsidies, death benefits, and loan guarantees.

6. Authority to Make Regulations which Conflict with those Made under Other Statutes, or with Other Statutes Themselves

No Act authorized the making of regulations which would supercede those made under another statute, but thirteen Acts permitted cabinet regulations to take precedence over other statutes themselves.[21] Of these thirteen, ten related to international agreements. Although a "notwithstanding" clause is undoubtedly convenient, in that it permits the cabinet to disregard the provisions of other Acts, it is generally an undesirable form of delegation. The cabinet should be required to draw to Parliament's attention, and perhaps to justify, any regulations which conflict with other legislation.

7. Authority to Amend the Parent Act

What constitutes "amendment" of the parent Act? At least 185 statutes delegated power, frequently more than once and usually to the Governor-in-Council, to do things which might in a broad sense be considered as amending the parent Act. These delegations are summarized in Table 4.

The extent to which these "amendments" should be permitted cannot be decided arbitrarily. The Honourable J. C. McRuer, Chief Justice of the Ontario High Court, was very critical of them, although his definition of "amendment" was narrower than that suggested by Table 4:

> Such delegation of legislative power provokes the comment that the Legislature was not sure what it meant so to avoid making up its mind it delegated the power to decide to another body.
>
> . . . .
>
> Powers of definition or amendment should not be conferred unless they are required for urgent and immediate action. Such exercise of power to alter the scope or operation of an Act may vitally affect rights of individuals or classes of individuals coming within its purview.
>
> The rule should be that the normal constitutional process of amending the parent Act should be followed so that the amendment may be publicly debated in the Legislature.[22]

The Statutory Instruments Committee, noting McRuer's comments, but defining "amendment" basically as suggested in Table 4, recommended that "there should be no authority to amend statutes by regulation."[23]

While the dangers inherent in the delegation of power to amend must be admitted, it should also be recalled that flexibility is one of the main reasons for delegating legislative power in the first place. Perhaps McRuer, but especially the Statutory Instruments Committee, was unduly rigid with respect to some types of amendment.

TABLE 4

FREQUENCY OF AUTHORITY TO AMEND PARENT ACT
(1967-68 ACTS-IN-FORCE)

"Amending" Power[a]	Recipient (No. of Instances)		
	Governor-in-Council	Minister (incl. Treasury Board)	Other Gov't. Body
Determine when Act (or Part) in force	64[b]	. .	. .
Determine when Act (or Part) terminates	3	. .	. .
Determine when Act (or Part) in force and when it terminates	25	. .	. .
Change schedule	16	. .	. .
Define words	41	3	3
Make regulations for situations not covered by Act	6	. .	. .
Adapt provisions of Act	4	. .	. .
Extend or restrict application of (or exemption from) Act or parts	57	8	2
Defer implementation of, or suspend, parts of Act	1	1	. .
Extend duration of Act beyond stated date	4	. .	. .
Repeal parts of Act	1	. .	. .
Change responsible minister	4	. .	. .
Add duties to responsible minister	2	. .	. .

[a] A number of Acts stated that certain things may be done "notwithstanding anything in this Act" (or Part, or section, or subsection). No count of the instances of this power was made, but examples included the Customs Act (R. S. C., 1952, c. 58, s. 39[1]), Divorce Act (S. C., 1967-68, c. 24, s. 19[2]), and Public Service Superannuation Act (S. C., 1952-53, c. 47, s. 30[5]).

[b] There were no doubt many more instances of this power because amendments, not counted in arriving at this figure, frequently included this provision.

8. Exemption from Judicial Review

Privative clauses are intended to prevent the courts from reviewing the exercise of delegated power. It appears that only two statutes in 1968 explicitly excluded judicial scrutiny,[24] but seven others provided that regulations (or other actions) would be final and conclusive and not open to question or review, would be deemed to be within the subordinate body's powers and conclusive against interested parties, would be conclusive evidence for certain purposes, or conclusive evidence that certain situations existed. The apparent futility of privative clauses is briefly discussed in Chapter V.[25]

Another eighteen statutes provided that regulations would have effect "as if enacted by this Act" or that they "shall have the force of law."[26]

9. The Generality of Delegated Power

Because there is a great variety in the scope of powers delegated by Parliament, some classification is necessary. Furthermore, inasmuch as the present study is concerned about control of subordinate legislation, a helpful classification would seem to be one which carried implications for control.

Driedger has suggested a four-category classification based upon the degree of generality of delegation: authority to make (1) specified regulations, (2) regulations to accomplish a specified purpose, (3) regulations in relation to a specified subject, and (4) regulations "to carry out the provisions" of an Act.[27] The more general is the delegation, the greater is the difficulty establishing the limit of the power delegated. Each category includes delegations expressed in both objective and subjective terms; subjectively-worded delegations increase the difficulty of establishing the limits of authority. Table 5 summarizes the delegations made in the 1967-68 statutes-in-force. Of course, delegations within each of the categories are not all of the same importance. This is demonstrated in the following paragraphs.

The most specific delegation is authority to make a given regulation. Indeed, several of the characteristics of delegated authority described earlier in this Chapter are within this category. Typically, the recipient of such a specific power is authorized to "prescribe," "fix," "determine," "prohibit," "require," "define," "establish," "specify," and so on.

For example, the Canada Dairy Products Act states that

> The Governor-in-Council may by regulation prohibit
> (a) importation into Canada,
> (b) exportation out of Canada, or
> (c) sending or conveyance from one province to another, of
> a dairy product of any class. . . .[28]

Authority to "prescribe forms for the purposes of this Part" of an Act is not only specific, but is also a narrow grant of power;[29] however, authority to define a key term such as "manufacturing or processing operation" within the Area Development Incentives Act, or "totally and permanently disabled" for the purpose of the Disabled Persons Act,[30] is much broader. Power to proclaim the existence of "war, invasion or insurrection," is undoubtedly the broadest power contained in the Statutes of Canada because of other delegated powers which are thereby unleashed.[31]

Less specific than the delegation of power to make a given regulation is authorization to make regulations for a given purpose. For

TABLE 5

GENERALITY OF DELEGATION (NUMBER OF INSTANCES)[a]
1967-68 ACTS-IN-FORCE

Type of Recipient	Specified Regulation		Specified Purpose		Specified Subject		Carry out Act's (Part's) Provisions			Total		
	Obj.	Subj.	Obj.	Subj.	Obj.	Subj.	Obj.	"Deemed"[b]	Subj.	Obj.	Subj.[c]	Total
Governor-in-Council	257	27	64	22	83	12	120	52	50	524	163	687
Minister (incl. Treas. Board)	44	6	7	8	10	5	12	4	27	73	50	123
Government body	29	4	21	1	20	1	8	. .	4	78	10	88
Other	10	. .	18	1	5	. .	6	. .	. .	39	1	40
Total	340	37	110	32	118	18	146	56	81	714	224	938

[a] Although the same category of power may be delegated more than once to the same individual recipient in a given Act, it is included in the Table only once.

[b] Although these powers are likely subjective, they are shown separately because of their frequency. In at least fourteen other instances some authority (the Governor-in-Council in eleven of them) was empowered to make such specified regulations (six times), regulations for a specified purpose (5 times) or in relation to a specified subject (3 times), as was "deemed" necessary. They are included in the appropriate categories as subjective powers.

[c] This includes all "deemed" powers.

example, the Canada Pension Plan Act provides that "for the purpose of giving effect to any agreement entered into under subsection (1), the Governor in Council may make such regulations . . . ."[32] The breadth of the power depends upon the breadth of the purpose--"the control of the speed, operation and parking of vehicles on roads within [Indian] reserves" is much narrower than "the security, defense, peace, order and welfare of Canada."[33]

A still more general delegation is one which authorizes the recipient to make regulations "in relation to," "respecting," "as regards to," "governing," "as to," a specified subject matter. It is more general because relationship to a subject matter is difficult to disprove. The breadth of delegation in this case depends upon the breadth of the subject. A narrow subject would be "the form in which the taking of oaths of allegiance is to be attested and the registration thereof."[34] More broadly, the Fisheries Act permits the Governor-in-Council to make regulations respecting "the conservation and protection of fish," "the operation of fishing vessels," "the obstruction and pollution of any waters frequented by fish," and the export or interprovincial movement of fish "or any part thereof."[35]

Frequently, an enabling section contains two or all three of the types of delegation just described. A good example of this is in the Canada Labour (Standards) Code Act which empowers the Governor-in-Council to make regulations "requiring," "governing," "for calculating and determining," and "for any other matter or purpose" authorized by the Act.[36] Purpose and subject could be combined to provide a double test of the validity of regulations. The recipient of delegated authority could be permitted, "for the purpose of . . . ," to make regulations "in relation to . . . ."[37]

A great many of the 1967-68 Acts-in-force made what appears to be a very general grant of power, usually to the Governor-in-Council, to make regulations for carrying out the purposes and/or provisions of the Act (or part of the Act).[38] This provision occurred either as a separate section or at the beginning or ending of a section which also listed specific regulations, purposes, or subjects. Kersell has expressed some alarm at the apparently broad scope of this delegation,[39] but H. W. Arthurs of the Osgoode Hall Law School maintains that the provision has in fact been narrowly interpreted by the courts, being held to sustain little more than "fairly routine procedural regulations."[40] In the opinion of the Deputy Minister of Justice (D. S. Thorson), the scope is much broader if the delegation stands alone than if it is accompanied by an enumeration of powers.[41]

Sometimes, though less frequently, this power is expressed in subjective terms so that the Governor-in-Council (for example) may make such regulations "as he deems necessary [or expedient]," or "as are in his opinion necessary," to accomplish the purposes of the Act. This variation is obviously a broader delegation because the criterion of necessity is left to the judgement of the subordinate authority.[42] Because effective control is more difficult, it is encouraging that the Government agrees that subjective delegations can be eliminated "in all but a few exceptional cases."[43]

B. Conclusion

Although the principle of parliamentary control of subordinate legislation can be justified on the grounds discussed in Chapter I, it is this writer's view that the information contained in the present Chapter provides evidence of the practical need for control.

A large proportion of the 1967-68 statutes-in-force contained enabling clauses, and one-quarter of these delegations were expressed in subjective terms. Furthermore, although authority to make specified regulations is presumably more readily controlled than more general delegations, it must be remembered that some specific delegations contained large grants of power.

When the Governor-in-Council exercises delegated power it normally acts upon the recommendations of individual ministers and thus provides a second look at regulations. It should be encouraging, therefore, that three-quarters of all delegations were made to the cabinet. However, information presented elsewhere in this study suggests that this added protection may be slight inasmuch as detailed cabinet scrutiny cannot be assumed.[44]

The extent to which Parliament should delegate authority having the specific characteristics discussed in this Chapter is debatable; there is no question, however, that subordinate legislation made pursuant to it should be scrutinized. Furthermore, the danger is ever present that regulation-making authorities may use their authority in ways not anticipated by Parliament.

The admitted need to delegate legislative power, sometimes extensive power, must be balanced by adequate parliamentary control techniques. The extent of delegation in the Statutes of Canada warrants concern if these techniques are lacking. The next Chapter, therefore, considers the statutory control mechanisms which existed before passage of the Statutory Instruments Act in 1971.

Footnotes

[1] S. C., 1967-68, pp. 317-341. Throughout this study, the terms "Act" and "statute" are used interchangeably to permit variation in terminology.

[2] Calculation of the number of statutes which delegated authority was aided, especially for statutes passed before 1952 and excluded from the 1952 Revised Statutes, by the "Preliminary Survey of the Canadian Statutes" prepared by Mdme. Immarigeon for the Statutory Instruments Committee. (Exhibits O, P, JJ, KK, LL, MM.) Mdme. Immarigeon counted 601 statutes in force on April 23, 1968, of which 420 contained enabling clauses. (Sixth Report, Exhibit MM, unpaged.) The discrepancy between these figures and those established by this writer is no doubt explained in part by the ten factors just noted, and by the deliberate exclusion by Mdme. Immarigeon of thirty-seven Acts "because the extent of their application is relatively limited." Furthermore, Mdme. Immarigeon explained that the survey "does not pretend to be exhaustive."

[3] For example: "The [Cape Breton Development] Corporation shall wind up its affairs and dispose of its assets and liabilities within such time . . . and in such manner and subject to such conditions as the Governor General in Council . . . may prescribe." (S. C., 1967-68, c. 6, s. 34[2].) Two other Acts which contained analogous provisions were the Currency, Mint and Exchange Fund Act (R. S. C., 1952, c. 315, ss. 23, 25[1]) and the Public Service Pension Adjustment Act (S. C., 1959, c. 32, s. 10[2]).

[4] In this study, the terms "cabinet" and "Governor-in-Council" will be used interchangeably to permit variation in terminology.

[5] Regulations to be made by the cabinet are usually recommended by the minister responsible for the administration of the Act, even when the Act does not require it. The concurrence of Lieutenant-Governors-in-Council was required by the Divorce Act (S. C., 1967-68, c. 24, s. 22) and The Lake of the Woods Control Board Act, 1921 (S. C., 1921, c. 10, s. 10[1]), and that of the Queen was necessary under the Seals Act (R. S. C., 1952, c. 247, s. 4).

[6] Library of Parliament Act, R. S. C., 1952, c. 166, s. 4.

[7] R. S. C., 1952, c. 249, s. 41. Note the phrase, "regulations . . . by rule or by order," as one example of the problem of terminology.

[8] J. R. Mallory, "Cabinet and Councils in Canada," Public Law, 1957, p. 247.

[9] Morden, "Survey," p. 31.

[10] Statutory Instruments Committee, Minutes, June 27, 1969, pp. 240-241. Thorson was Associate Deputy Minister of Justice when he made the statement.

[11] Ibid., June 26, 1969, p. 219.

[12] Under the Financial Administration Act both the cabinet and the Treasury Board were authorized to delegate certain powers--the Treasury Board to the "deputy head of a department or the chief executive officer of any portion of the public service," and the cabinet to a minister or "his deputy or the chief executive officer thereof." The recipients of this subdelegated power were in turn permitted to redelegate the power to persons under their jurisdiction. (R. S. C., 1952, c. 116, ss. 7[2], [3], [4].)

[13] For example, three witnesses who appeared before the Statutory Instruments Committee expressed three different points of view. C. L. Brown-John opposed subdelegation in principle; A. Abel saw "no impropriety about it at all," depending upon "the scope of the primary delegation, and . . . on the character of the primary delegate, and of the subdelegates"; and J. E. Kersell suggested that "rule-making power should not be ordinarily delegated a second time." (Statutory Instruments Committee, Minutes, April 22, May 1, 13, 1969, pp. 43, 73, 84.)

[14] An example was the Pacific Fur Seals Convention Act (S. C., 1957, c. 31, s. 4) which delegated power "to do and authorize" to the Governor-in-Council. Note especially, however, the Industrial Relations and Disputes Investigation Act which provided that the Labour Relations Board may, "subject to regulation [presumably of the Governor-in-Council], . . . by order authorize any person or board to exercise or perform all or any of its powers or duties under this Act relating to any particular matter." (R. S. C., 1952, c. 152, s. 59.)

[15] Estate Tax Act (S. C., 1958, c. 29, s. 57[2]), Income Tax Act (R. S. C., 1952, c. 148, s. 117[2]), Railway Belt Water Act (R. S. C., 1927, c. 211, s. 6[2]).

[16] He noted, for example, that the Income Tax Act delegated this power in order that regulations published after the beginning of a taxation year could be effective for the entire year. (Statutory Instruments Committee, Minutes, June 27, 1969, p. 241.)

[17] Statutory Instruments Committee, Minutes, June 26, 1969, p. 219. Before passage of the Regulations Act, several statutes provided that regulations became effective when published or on such "other date" as specified in the regulations. From Mr. Beseau's comment it seems unlikely that this loose wording would have been interpreted as authorizing retroactive regulations. It is interesting that several other Acts stated that regulations would be effective upon publication or such "later date" as specified in the regulations. All instances

of both wordings were repealed by the Regulations Act.

[18] *R. S. C., 1952*, c. 229, s. 4(1); and *S. C., 1913*, c. 54, s. 19(v).

[19] Norman Ward, *The Public Purse: A Study in Canadian Democracy* (Toronto: University of Toronto Press, 1951), p. 3.

[20] Income Tax Act (*R. S. C., 1952*, c. 148, s. 66[1], [2]); Indian Act (*R. S. C., 1952*, c. 149, s. 72[1][d]); Customs Act (*R. S. C., 1952*, c. 58, s. 39[1]); Export Act (*R. S. C., 1952*, c. 103, ss. 2, 3, 4); National Parks Act (*R. S. C., 1952*, c. 189, s. 7[q], [r]).

[21] The usual wording was: "notwithstanding the provisions of any law in force in Canada." The Defense Production Act authorized a cabinet "order" to take priority over other statutes or regulations made pursuant to them, but the relevant section expired in 1959. (*R. S. C., 1952*, c. 62, s. 28[1].)

[22] Ontario, Royal Commission Inquiry into Civil Rights, *Report Number One*, volume 1, p. 348.

[23] Statutory Instruments Committee, *Third Report*, p. 37.

[24] Railway Act (*R. S. C., 1952*, c. 234, s. 53[9]), and National Energy Board Act (*S. C., 1959*, c. 46, s. 19[3]).

[25] See below, pp. 111-113.

[26] Although seventeen of the eighteen statutes existed when the Regulations Act became law, that Act repealed similar provisions in thirty-four other statutes.

When Driedger was Assistant Deputy Minister of Justice he expressed uncertainty as to the purpose of these provisions and suggested that "whatever the intent it should be possible to state it in a more precise way." (Elmer A. Driedger, *The Composition of Legislation* [Ottawa: Queen's Printer, 1957] p. 148). See below, pp. 105-106.

[27] Elmer A. Driedger, "Subordinate Legislation," *Canadian Bar Review*, XXXVIII (1960), 28-34. The fourth category could be subsumed under the second (purposes), but it is listed separately because of the frequency of, and controversy surrounding, its use.

[28] *R. S. C., 1952*, c. 22, s. 5(1).

[29] Aeronautics Act, *R. S. C., 1952*, c. 2, s. 13(h).

[30] *S. C., 1965*, c. 12, s. 12(a); and *S. C., 1953-54*, c. 55, s. 11(1)(a).

[31] War Measures Act (*R. S. C., 1952*, c. 288, s. 2).

[32] *S. C., 1964-65*, c. 51, s. 109(2). There may be no difference, in terms of the result, between a provision which permits a recipient of delegated power to "make regulations providing for . . . the definition of . . ." (for example, the Blind Persons Act, *R. S. C., 1952*, c. 17, s. 11[1][a]), and one which permits him "to define"; or between a provision permitting a recipient to make regulations "for including" certain stated employments as pensionable employments (Canada Pension Plan Act, *S. C. 1964-65*, c. 51, s. 7[1]), and one which permits him to "include" such stated employments. However, the scope of authority delegated in terms of purpose is the greater.

[33] Indian Act (*R. S. C., 1952*, c. 149, s. 72[1][c], and War Measures Act (*R. S. C., 1952*, c. 288, s. 3[1]).

[34] Canadian Citizenship Act, *R. S. C., 1952*, c. 33, s. 34(1)(e).

[35] *S. C., 1960-61*, c. 23, s. 5.

[36] *S. C., 1964-65*, c. 38, s. 50.

[37] This was suggested by the Government in its submission to the Statutory Instruments Committee. (Statutory Instruments Committee, *Minutes* [Appendix "J"], October 7, 1969, p. 260.)

[38] The following examples show that there is considerable variation in the wording of this provision.

"The Governor in Council may make regulations for carrying out the purposes and provisions of this Act." (Agricultural Stabilization Act, *S. C., 1957-58*, c. 22, s. 11.)

"The Minister may make regulations, not inconsistent with this Act . . . , to carry out the purposes and provisions of this Act." (Canada Dairy Products Act, *R. S. C., 1952*, c. 22, s. 7[3].)

"The Governor in Council may, for the purposes of this Act, from time to time make regulations for . . . (i) any other purpose for which it is deemed expedient to make regulations in order to carry this Act into effect." (Civil Service Insurance Act, *R. S. C., 1952*, c. 49, s. 8.)

"The Governor in Council may, from time to time, make such rules and regulations, not inconsistent with this Act, as are necessary for giving effect to its provisions and for declaring its true intent and meaning in all cases of doubt . . . ." (Electricity Inspection Act, *R. S. C., 1952*, c. 94, s. 4.)

"The Governor in Council may make regulations deemed necessary for the efficient enforcement and operation of this Act and for carrying out its provisions according to their true intent and meaning and for the better attainment of its objects." (Small Loans Act, R. S. C., 1952, c. 251, s. 21.)

"The Governor in Council may . . . make regulations . . . to do all or any things necessary to carry out the provisions of this Act within their true intent and meaning or reasonably incidental thereto." (War Risk Insurance Act, S. C., 1942-43, c. 35, s. 34[1][n].)

"The Governor in Council may make regulations . . . (j) generally dealing with any matter arising in the course of the administration of this Act, for carrying into effect the purposes of this Act and the true intent, meaning and spirit of its provisions." (Emergency Gold Mining Assistance Act, R. S. C., 1952, c. 95, s. 7[1].)

[39] Kersell, Parliamentary Supervision, p. xi.

[40] Statutory Instruments Committee, Minutes, April 22, 1969, p. 25.

[41] Ibid., June 27, 1969, pp. 241-242.

[42] Some statutes authorized the making of regulations "deemed necessary" without stating who is to do the deeming. It seems likely that this, too, is a subjective delegation. One might wonder, however, how consistently attention was paid to the choice of wording. For example, the Canada-United States of America Tax Convention Act of 1943-44 authorized the Minister of National Revenue to make regulations "as may be deemed necessary" (c. 21, s. 4); the Act of 1944-45 authorized the Minister to make regulations "as are, in his opinion, necessary" (c. 31, s. 4). The Canada-United Kingdom Income Tax Agreement Act, 1966 (S. C. 1966-67, c. 14 [Part I] s. 2[3]) empowered the Minister of National Revenue to make regulations "as are necessary"; the Canada-Sweden Income Tax Agreement Act (Part II of the same statute, s. 4) authorized the Minister to make regulations "as are, in his opinion, necessary."

The Surplus Crown Assets Act (R. S. C., 1952, c. 260) enabled the cabinet to make regulations "*as he may deem* necessary or desirable with reference to the organization, administration or management of the Corporation and confer on the Corporation additional powers and duties" (s. 18[a]), and to make regulations "*as may be deemed* necessary or desirable to assist the Minister to exercise and perform the duties conferred or imposed upon him by or pursuant to this Act" (s. 18[b]). (Italics mine.)

[43] Statutory Instruments Committee, Minutes (Appendix "J"), October 7, 1969, p. 259.

[44] See below, pp. 91-92.

CHAPTER III

OVERVIEW OF PARLIAMENTARY CONTROLS TO 1971

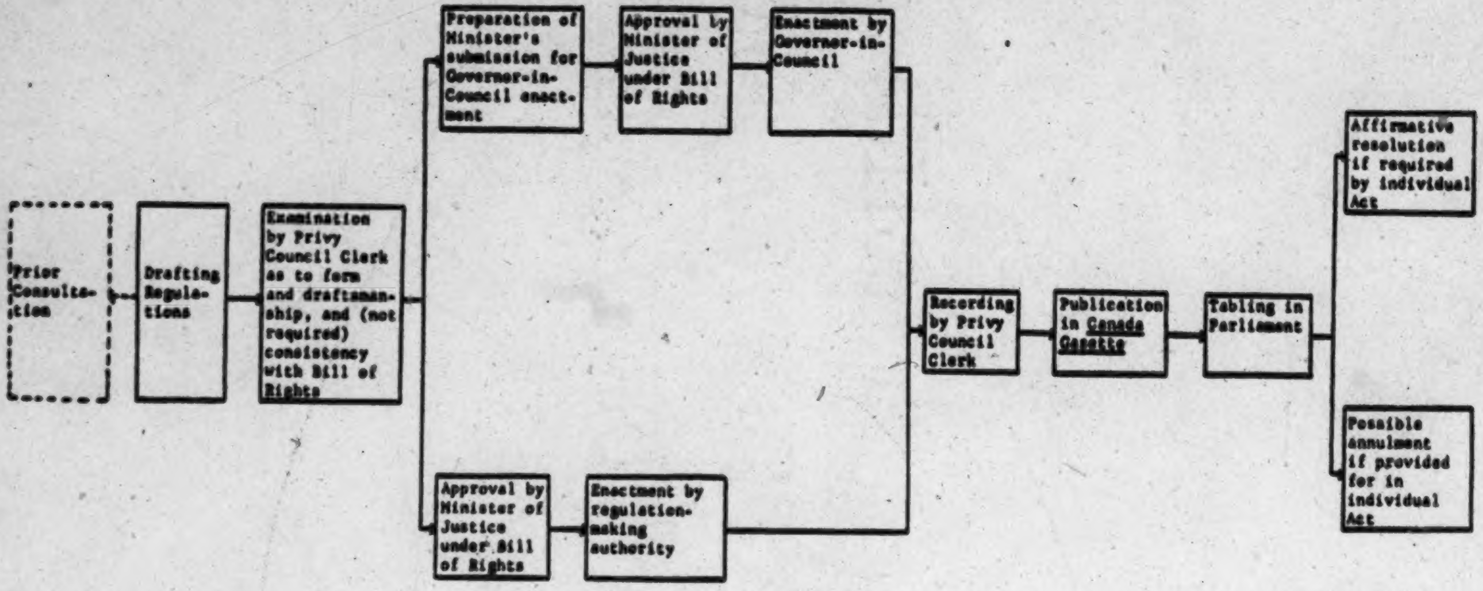
Until the Statutory Instruments Act was passed in 1971, the main statutory provision for parliamentary control of subordinate legislation was the 1950 Regulations Act (which was repealed by the new legislation). The only other general control provision was, and still is, Section 3 of the Canadian Bill of Rights.[1] (Figure I shows the stages governing the making of regulations under the Regulations Act and the Bill of Rights.) In addition, however, regulations made pursuant to many statutes have been subject to methods of control as specified in those Acts themselves.

A. Control Measures having General Application

Before World War Two, the publication and tabling of some regulations was required by individual Acts. While these requirements were not broadened during the War, the obvious need for public awareness led to the making in 1942 of an order-in-council which provided for the publication in the Canada Gazette of orders, rules, regulations, and proclamations relating to the War.[2] In addition, the Government began tabling all orders-in-council pertaining to the War.[3] The "Statutory Orders and Regulations Order, 1947," extended publication to proclamations, orders, rules, and regulations made by the Governor-in-Council, ministers, boards, agencies, or officers, which were "of a legislative character or of an administrative character having general effect or imposing a penalty."[4]

FIGURE 1

STAGES GOVERNING THE MAKING OF REGULATIONS UNDER THE REGULATIONS ACT AND THE BILL OF RIGHTS


Prior Consultation
Drafting Regulations
Examination by Privy Council Clerk as to form and draftsmanship, and (not required) consistency with Bill of Rights
Preparation of Minister's submission for Governor-in-Council enactment
Approval by Minister of Justice under Bill of Rights
Enactment by Governor-in-Council
Approval by Minister of Justice under Bill of Rights
Enactment by regulation-making authority
Recording by Privy Council Clerk
Publication in Canada Gazette
Tabling in Parliament
Affirmative resolution if required by individual Act
Possible annulment if provided for in individual Act

The "first serious proposal" for a parliamentary committee to scrutinize regulations may have been made by the Honourable Brooke Claxton.[5] In the 1943 Throne Speech debate Mr. Claxton predicted that the extensive wartime use of orders-in-council would lead to demands for greater protection against the bureaucracy:

> The practice of tabling orders in council is, for all practical purposes, an empty form. I suggest that orders in council be referred to a committee for consideration--not all the orders, but orders having the effect of legislation of a general nature. Even when they get to the committee, all of the orders of that kind would not be discussed; but if the committee felt that one particular matter should be discussed it could take up that order, have the departmental officials there to explain it, and make its report to the house. This could be done exceedingly quickly . . . . There would be exercise of control over the executive, opportunity for ventilating grievances, and also observance of the important principle of the supremacy of parliament.[6]

Six years later, Mr. Diefenbaker said he would like to see "a committee of parliament set up, that would examine delegated [legislative] authority . . . [and be] a watchdog in the preservation of our democratic rights."[7] Prime Minister St. Laurent thought that "the suggestion . . . [had] merit," and he undertook to study the operation of the scrutiny committee in the British House of Commons and "in the light of its operation and of such other considerations as may seem relevant, to indicate at an early stage in the session of 1950 whether we would be prepared to support the establishment of a similar committee in Canada."[8]

1. Regulations Act

Statutory provision for the publishing and tabling of regulations, but not for their scrutiny, came in 1950 with the passage of the Regulations Act. In moving second reading of the Bill, the Prime Minister said that "the main purpose . . . is to ensure that all orders, regulations and proclamations, made or issued in the exercise of legislative powers delegated by parliament, are published and tabled in a systematic and uniform manner."[9]

The Bill provided, therefore, that "regulations" as defined in Section 2(a) were to be published in the Canada Gazette (s. 6) within thirty days after they were made (unless the regulation-making authority extended this time limit), and tabled in Parliament (s. 7) within fifteen days after they were published or, if Parliament were not then in session, within the first fifteen days of the next session. Section 9 authorized the Governor-in-Council to make regulations exempting any regulations from these requirements, but the exempting regulation itself had to be published and tabled.[10]

Although failure to publish did not invalidate a regulation, no person could be convicted for contravening an unpublished regulation unless (a) the Governor-in-Council had exempted the regulation, or the regulation itself provided for its operation before publication, and (b) "it is proved that . . . reasonable steps" had been taken to bring the regulation to the attention of the public or the persons likely to be affected or the person charged (s. 6[3]).

Debate of the Bill was brief in both houses--occupying six pages in the Senate and nine pages in the House of Commons[11]--and it centred on the need for adequate publicity of subordinate legislation rather than on parliamentary control. Even Mr. Fulton's inaccurate generalization that tabled orders-in-council were effective only after

Commons approval, was intended to stress publicity rather than parliamentary scrutiny.[12]

Speakers in the House of Commons also sought clarification of the purpose of Section 9, but they were satisfied with the Prime Minister's assurance that the existence of regulations could not be secret inasmuch as exempting regulations themselves had to be published and tabled. Mr. St. Laurent admitted that

> it may be that in certain cases we will have to use terms [in an exempting regulation] perfectly innocuous to attract as little attention as possible to anything that we think should not be talked about; but nevertheless it will be on the table of parliament, and if hon. members choose to talk about it, it will be their privilege to do so.[13]

How satisfied members might be with the Government's response to questions about unpublished regulations would, of course, be another matter!

One of the most perceptive questions was asked by Senator Farris, although he seemed not to realize its significance: Who determines whether they [regulations] are legislative or purely administrative?"[14] The Special Committee on Statutory Instruments discovered twenty years later that some documents of a legislative nature were classified as administrative by regulation-making authorities, and were therefore by-passing the requirements of the Regulations Act and the Bill of Rights.[15]

There was no criticism of the Bill's contents or, surprisingly, of the absence of provision for a scrutiny committee. Indeed, the only mention of such a committee was the Prime Minister's explanation why the Government rejected its establishment:

> We do not believe we should recommend at this time that sort of committee because most of the statutory regulations have to

> be made by the governor in council, and that gives considerable time for checking, whilst in the United Kingdom most of these things are done by boards or other agencies of the crown. No one who is responsible to parliament or to the public hears of these regulations until they have become law. This United Kingdom [House of Commons scrutiny] committee has strictly limited terms of reference that probably would not fit our situation. They have to report on whether or not the order infringes seven stated principles. If it does not, the committee has nothing to do with it. If it does, they call attention to that fact. We do not believe that would be a remedy that would fit our situation.[16]

Although members of Parliament might be excused for missing the Prime Minister's factual errors in describing British practice, it seems inconceivable that the Opposition let pass without comment the suggestion that cabinet scrutiny is a satisfactory substitute for parliamentary control. Furthermore, as Kersell points out, "why, . . . if the British terms of reference would not fit the Canadian situation, could not other terms of reference be stipulated? The Prime Minister . . . implies that the Canadian situation requires some remedy, but that no remedy at all would be better than the British remedy is hardly tenable."[17]

That the passage of the Regulations Act was an important step forward must not be minimized; unfortunately, however, it provided little to facilitate parliamentary scrutiny--and no member seemed to care.

The only attempt to amend the Act during the twenty years it was in force was made in 1953[18] by Stanley Knowles who sought the repeal of Section 9(2). He thought that in 1950 the House had not realized the "full import" of that section which, in his view, effectively permitted the Government to make secret orders-in-council. Mr. Howard Green (Cons.) supported the amendment which was talked out by Justice

Minister Garson during the second reading debate.

2. Canadian Bill of Rights

Most of the debate on the Bill of Rights related to the question of civil liberties generally, and only incidentally did it touch upon control of subordinate legislation.

According to Section 3 of the Bill as passed in 1960:

> The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act . . . , in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.[19]

The original Bill introduced by Prime Minister Diefenbaker in 1958[20] required the Minister of Justice to examine regulations and bills to "ensure" that they did not contradict the principles of the Bill of Rights. Justice Minister Fulton explained the reason for the change to "ascertain" in the 1960 Bill:

> We looked at ourselves and felt that word ["ensure"] was a rather questionable one, because we felt: does that mean that the Minister of Justice, who is to ensure, must, by necessary implication, have the power to ensure? . . . If the Minister of Justice is to ensure, how is he to do this, unless you give him the power to do it? We felt that parliament would not want to give a single member of the government [that right] . . . .[21]

In neither Bill as introduced, however, was the Minister of Justice required to take any action when he discovered inconsistencies. During debate in the House of Commons and discussion in the Special Committee on Human Rights and Fundamental Freedoms, several suggestions were made to add to the Minister's responsibilities.[22] Mr. Fulton noted that his Department already examined regulations in draft, and that inconsistencies with statutes (which would include the Bill of Rights when passed) were removed before cabinet approval was given. For this reason, he said, it would be impossible to have inconsistencies once regulations were made.[23] He was referring, presumably, to the requirement contained in Section 4 of the regulations made under the Regulations Act, although those regulations required examination only as to "form and draftsmanship."

With respect to regulations which were not made or approved by the cabinet, he did not believe the Minister of Justice could be given any authority, although he agreed to "have a look . . . to see if we can strengthen . . . the obligation to report."[24] The result was an amendment suggested by Fulton, moved by Aiken and passed by the Committee, which required the Minister of Justice to "report any inconsistency to the House of Commons at the first convenient opportunity."[25]

B. Control Measures Applicable to Individual Statutes

Apart from opportunities presented during the normal course of debate there have been four statutory provisions which aid parliamentary control of subordinate legislation. These are the provisions for publication, tabling, annulment, and confirmation by Parliament. While the requirement to publish is not as obviously related to control as are the other three, publication is an important means by which members of Parliament are informed of regulations' existence. In Mr. Turner's words, "you cannot hit what you cannot see."[26] Tabling has been the official method of drawing members' attention to regulations. However, it has been "an empty form" inasmuch as regulations required only to be deposited with the Clerk of the House and recorded in Votes and Proceedings.[27]

Provisions for annulment and affirmative resolutions, always in conjunction with the requirement to table, are more direct methods of parliamentary control in that they either permit Parliament to revoke regulations within a stated period of time, or require parliamentary action in order to make regulations effective or to keep them in force.

Of the 417 1967-68 statutes-in-force which delegated authority, 151 contained one or more of these control provisions. This is shown in Table 6.[28]

TABLE 6

FREQUENCY OF CONTROL PROVISIONS
(1967-68 STATUTES-IN-FORCE)

Control Provision	Number of Statutes[a]
To publish	90
To table	27
To publish and table	35
Annulment resolution	10[b]
Affirmative resolution	3[c]

[a] Statutes which provided for different control methods for different regulations have been included in each appropriate category.

[b] Three of these Acts required publication as well.

[c] Two of these Acts required publication as well.

1. Requirement to Publish

In most of the ninety statutes which required publication, a regulation had to appear once in the Canada Gazette at an unspecified time, and it became effective either when it was published or at some later date. Table 7 summarizes some of the variations of the publication requirement.

TABLE 7

CHARACTERISTICS OF PUBLICATION REQUIREMENT (1967-68 STATUTES-IN-FORCE)

Characteristic	Number of Statutes[a]
Place of publication	
Canada Gazette alone	84
Newspaper alone	1
Canada Gazette and newspaper	5
Number of times to be published	
Once	79
More than once	11
Time of publication	
Not specified	77
Next issue, "forthwith," "as soon as may be," "as soon as is practicable"	8
Other	5
When regulation effective	
Unspecified	27
When published or when specified in regulation	42
When approved by cabinet (and, in most cases, when published)	19
When made	2

[a] When an Act contained different publishing requirements for different regulations, the requirement which was least common from the viewpoint of all statutes was chosen.

Regulations made under two of the ninety statutes had to be published only if they were of "general application," but this phrase was undefined.[29]

Debate of only twenty of the ninety statutes touched on the publication requirement, and in no case was it lengthy or argumentative. Indeed, for eight of them the "debate" consisted of an allusion to the publication requirement (for five of them, by the bills' sponsors). In four others, members of Parliament noted the inadequacy of publication in the Canada Gazette as a means of publicizing regulations. One critic suggested that regulations be embodied in the bill so that people from coast to coast would know of them--a suggestion which conflicts with the purpose of delegating authority.[30] One might also question the implicit assumption that the statute would be read more widely than the regulations.

Nine amendments were made, six of them to insert a publication requirement, and three to modify an existing one. The ease with which these amendments were made, including the brevity of the discussions, suggests an absence of controversy. Indeed, one wonders why Governments had not included provisions for publication in the bills before their introduction into Parliament, as they had in so many other bills. All amendments but one were made in the House of Commons.

2. Requirement to Table

The tabling of regulations was required by twenty-seven statutes. In twenty-three cases, regulations were to be laid before "both houses" or before "parliament"; in the other four, they were to be tabled in the House of Commons. The debates revealed no reason for the four exceptions, but three of those Acts were passed during the Depression and related to the expenditure of public funds for the alleviation of distress.[31] The period of time within which regulations had to be tabled varied considerably: from "forthwith" or "as soon as may be" after the regulations were made (twelve statutes), to ten days (one statute), fifteen days (four statutes), thirty days (one statute), or three weeks after their making (three statutes). One Act contained no time limit, four required tabling during the following session of Parliament, and one referred to the tabling provision of the Regulations Act. In the event that Parliament had prorogued when a deadline was reached, tabling was generally required within the same period after the beginning of the next session, although three statutes specified publication in the Canada Gazette as the alternative.[32]

There seems to be no explanation of the bewildering variety of deadlines, unless one can assume the variety to be a manifestation of the rather loose terminology associated with the delegation of power in the Statutes of Canada.

The tabling provisions were considered during the debates of ten of the twenty-seven bills. For three of the ten, only brief comments were made. One of these is noteworthy.

When the 1948 Treaties of Peace Bill was before the House of Commons the Honourable Louis St. Laurent, Secretary of State for External Affairs, said that he had anticipated a debate. The tabling provision had been inserted

> because my experience with this house has been that whenever something of legislative effect is authorized to be done by the governor in council, parliament wants it tabled at an early day. So that to forestall any request that might have been made for that kind of provision it was thought advisable to have it inserted in the bill before it was introduced.[33]

Surely this reasoning could have been applied to many other bills, although Parliament has evidently been not as vigilant as Mr. St. Laurent believed.

Seven of the bills were amended, and six of them (including the two made in the Senate) were accepted by the Government without argument. Four of the six introduced the tabling requirement; the others modified existing provisions. Debate of the seventh amendment is noteworthy because of the remarkable logic displayed by the Honourable J. D. Reid, Minister of Railways and Canals, during debate of the 1919 Canadian National Railway Co. Bill.[34] Having acknowledged that "when Parliament meets all the Orders in Council that have been passed can be laid upon the Table for the consideration of the House," Mr. Reid added that a statutory requirement to table "does not make it any more certain that the Orders will be laid."

> If they are not laid upon the Table by the Minister of Railways hon. members will ask for them and they will be produced. I do not see that this proposal [to require tabling] would afford any greater protection. I do not think we should load the Bill up any more . . . . [We] are trying to keep away as much as possible from laying Orders in Council upon the Table.
>
> . . . .
>
> There has been so much complaint about Orders in Council having been passed that one does not want so many Orders in Council as the hon. member does.

An amendment to insert the requirement to table was, nevertheless, accepted by the Government.[35]

3. Requirement to Publish and to Table

The dual requirement to publish and table was included in thirty-five Acts. Variations of this requirement are shown in Table 8. Seven of the bills were amended, one of them in the Senate. Five of the seven added the requirement, and two modified existing ones.

TABLE 8

CHARACTERISTICS OF REQUIREMENT TO PUBLISH AND TABLE (1967-68 STATUTES-IN-FORCE)

Characteristic	Number of Statutes
To publish	
Place	
Canada Gazette alone	35
Number of times	
Once	35
Time	
Not specified	21
"When made," "forthwith," "immediately"	8
Other	6
To Table	
Place	
Both houses	34
House of Commons alone	1
Time	
"Forthwith," or "as soon as possible"	8[a]
Within 10 or 15 days	23[a]
Next session	3
Annually	1
When regulations effective	
Unspecified	22
When published	11
Other	2

[a] If Parliament had prorogued, tabling generally was to occur within the first ten or fifteen days of the next session.

Only once was there more than a brief discussion. In 1944, Mr. A. W. Neill (Ind.) delivered a three and one-half page speech in which he lamented the general absence of parliamentary control over regulations. His specific recommendation, that regulations be published as well as tabled, was accepted by the Government without argument.[36] He also urged the creation of a scrutiny committee.

4. Provision for Annulment Resolution

Publishing and tabling requirements are intended to inform members of Parliament, as well as the interested public, of the existence of subordinate legislation. They do not, however, provide for parliamentary action.

On the other hand, ten of the statutes-in-force in 1967-68 gave Parliament the opportunity to annul certain regulations.[37] The typical provision for annulment required that a regulation be tabled in both houses of Parliament within a specified time, which varied from "as soon as possible" to fifteen days after its making. If within a given period of time after tabling (varying from seven to sixty days) an annulment resolution were passed by both houses, the regulation would be repealed.[38] It is noteworthy that five of the ten Acts did not guarantee debate of motions to annul, and that these five included all four which occasioned no debate when they were before Parliament. The other five provided that a motion in either house, signed by ten members of that house, would be debated within four (three, in one case) sitting days.

Four of the ten bills were amended, one of them in the Senate, to add the annulment provision. The debate of the 1959 National Energy Board Act is of interest because of a comment made by the Honourable Gordon Churchill. In response to criticism of the authority given to the cabinet to extend the provisions of the Act to oil, the Minister promised that a proclamation making such an extension would be "immediately tabled in the House of Commons and debate permitted with regard to that action." When Mr. McIlraith asked what procedure would be used to ensure a debate, Churchill replied that

> it has been done before . . . . It would be open to the house at the time that document was tabled or subsequently, on recognition of the place in the program for a debate of that nature, to debate it. It has frequently happened that the government of the day has agreed to the debate of a subject on the request of the opposition. We are suggesting it can be done under these circumstances.[39]

While the Minister's and the Government's good faith cannot be questioned, the right of the House to debate an issue should not depend upon the Government's willingness to allow it. However, in view of the criticism, the Government introduced an amendment requiring that a proclamation be tabled and that a motion to annul be debated within four days.[40]

5. Requirement of Affirmative Resolution

The most direct form of parliamentary control over subordinate legislation is the requirement that regulations be confirmed by Parliament. Three statutes contained this provision, and debate of two of them touched upon this requirement. The requirement was deleted without debate from a fourth statute in 1926.[41] At least three attempts to add the requirement were unsuccessful.[42]

In 1928, the Government discovered that some five thousand orders-in-council passed since 1906 under five statutes (all of which were repealed before 1967-68), had not been affirmed as required. The Regulations and Orders in Council Act[43] validated them. During debate of this validating legislation, Conservative leader R. B. Bennett suggested that "the principle involved is certainly unsound in part," but there was no serious criticism in either house of the Government's proposed remedy.[44] However, it will be realized that both Liberal and Conservative governments had been delinquent over the years. There was, apparently, some question as to the legal implications of the failure to secure parliament's approval at the time these orders were made. However, the Honourable Charles Stewart, who spoke for the Government, stated that on the basis of the advice given by the Department of Justice, "we are not admitting even yet that the sanction of parliament is absolutely required to validate them."[45]

C. Conclusion

This Chapter demonstrates that control machinery beyond the normal debating opportunities has in the past been lacking. It is true that a few statutes have provided for annulment or affirmative resolutions. However, the extent to which these techniques may be appropriate means of control is questionable; this is considered in later Chapters.

The Regulations Act provided greater uniformity in the publishing and tabling of regulations. Nevertheless, it was pointed out that the tabling requirement appears to have been a meaningless exercise as a control technique. (This conclusion is supported also by the detailed study of the 1969-70 session.)

It is this writer's opinion, therefore, that the opportunities for parliamentary control provided by the Statutes of Canada were inadequate. However, before considering the need for reform, it is desirable to look at other existing control devices--specifically, those provided by the executive and the judiciary.

Footnotes

[1] *S. C., 1960*, c. 44.

[2] November 26, 1942, P. C. 10793.

[3] Kersell, *Parliamentary Supervision*, p. 23.

[4] November 26, 1946, P. C. 4876. Prime Minister St. Laurent later told the House of Commons that an order-in-council rather than a statute was chosen as the vehicle in order to permit flexibility as experience was gained. (*H. of C. Debates*, May 31, 1950, p. 3040.) The Order was made in 1946 but it became effective on January 1, 1947.

[5] Mallory, *The Structure of Canadian Government*, pp. 255-256.

[6] *H. of C. Debates*, February 9, 1943, pp. 296-297.

[7] *Ibid.*, September 22, 1949, p. 147. During Commons debate of the Bill of Rights in 1960 Mr. Diefenbaker, then prime minister, was asked when such a committee would be established. The most he would say, other than that the matter "deserves the fullest consideration," was that he hoped the committee on rules would make a recommendation during the next session. (*Ibid.*, July 7, 1960, p. 5948; and August 3, 1960, p. 7493.)

[8] *Ibid.*, October 19, 1949, pp. 927-928.

[9] *Ibid.*, May 31, 1950, p. 3039.

[10] Regulations made under ten, and later thirteen, statutes were so exempted. See P. C. 6173 (December 21, 1950), and P. C. 1954-1787 (November 18, 1954).

Regulations made under the Regulations Act prescribed certain duties of the Clerk of the Privy Council. These are considered in Chapter IV.

In addition, Section 3 of these regulations provided that "copies of Part II [of the *Canada Gazette*] and of all consolidations of regulations shall be delivered to such persons as are entitled to receive copies of the Statutes of Canada." It would appear that this should have included members of Parliament inasmuch as the Publication of Statutes Act designates them as recipients of the Statutes. The Statutory Instruments Committee pointed out, however, that "the Queen's Printer had adopted the practice of distributing the statutes and Part II of the *Canada Gazette* 'on written request only.'" (Statutory Instruments Committee, *Third Report*, p. 65. For the Publication of Statutes Act, see *R. S. C., 1952*, c. 230, s. 10[3].) The Committee could find no justification for the request requirement.

[11] *Senate Debates*, March 16, 1950, pp. 75-79, and March 30, 1950, pp. 184-185. *H. of C. Debates*, May 31, 1950, pp. 3039-40, and June 12, 1950, pp. 3494-3501.

[12] *H. of C. Debates*, June 12, 1950, p. 3495.

[13] *Ibid*., p. 3500.

[14] Senate Debates, March 16, 1950, p. 77. In his reply--"the courts"--Senator Hugessen also failed to recognize the implication of the question.

[15] See below, pp. 88-90, 124-126.

[16] *H. of C. Debates*, May 31, 1950, p. 3040.

[17] Kersell, *Parliamentary Supervision*, p. 70.

[18] *H. of C. Debates*, May 8, 1953, pp. 5012-5015.

[19] This Section was amended in 1971 by Section 27 of the Statutory Instruments Act to provide for examination of regulations after they have been made and when they are submitted to the Clerk of the Privy Council for registration. However, because the Clerk will already have examined them in draft, under Section 3(2)(c) of the Statutory Instruments Act, to determine their consistency with the Bill of Rights, the amendment does not appear to alter the examination procedure. In fact, the procedure now specified was the one actually followed before the amendment was made. (See below, pp. 84-86.)

However, Section 6 of the Bill of Rights, which created a new Section 6 of the War Measures Act, provided that any action taken under the War Measures Act "shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the *Canadian Bill of Rights*." Furthermore, Section 2 of the Bill of Rights anticipated that some Acts may declare that they "shall operate notwithstanding the *Canadian Bill of Rights*."

[20] Bill C-60. See *H. of C. Debates*, September 5, 1958, p. 4638. The Bill was allowed to die after an initial expression of views.

[21] Canada, Parliament, House of Commons, Special Committee on Human Rights and Fundamental Freedoms, 1960, *Minutes of Proceedings and Evidence*, July 20, pp. 322-323. (Hereinafter referred to as Committee on Human Rights, *Minutes*.) Mr. Fulton was referring specifically to the examination of bills.

[22] For example, Mr. Crestohl (Lib.), *H. of C. Debates*, July 5, 1960, p. 5752; Hon. Paul Martin, Committee on Human Rights, *Minutes*, July 23, 27, pp. 511, 576-577; Mr. Aiken (Cons.), Committee on Human

Rights, Minutes, July 27, pp. 575-576.

[23] Committee on Human Rights, Minutes, July 27, p. 576.

[24] Ibid., pp. 579, 576.

[25] Ibid., July 29, pp. 701, 706. The details would be worked out and included in the regulations made under the Bill of Rights, Fulton said. (P. 702.)

The Bill was also referred to the Standing Senate Committee on Money and Banking, but the Proceedings were not published. (Letter from Miss A. Pamela Hardisty, Assistant Librarian, Library of Parliament, June 18, 1970.)

[26] Canada, Parliament, Senate, Standing Committee on Legal and Constitutional Affairs, Proceedings, May 6, 1971, p. 7:9. Although Turner was referring to the need for a statutory requirement that subordinate legislation be referred to a scrutiny committee if that committee were to know whether or not it was "catching" all regulations, the comment applies equally to the question of publication.

[27] Canada, Parliament, House of Commons, Standing Orders, January, 1969, No. 41. The quoted words are those of Hon. Brooke Claxton. (Above, p. 52.) Although the Senate Rules do not specify a tabling procedure the practice, at least during the 1969-70 session, was to record tabled documents in the Debates.

[28] The Regulations Act repealed publication and/or tabling provisions contained in 113 statutes dating back to the 1927 Revised Statutes of Canada. Except for 26 of these statutes which by 1969-70 were no longer in force, these sections are included in this table. Of interest is the unexplained repeal by the Regulations Act of the tabling and annulment provisions in the Dominion Coal Board Act (S. C., 1947, c. 57, s. 11[6]) and the Navigable Waters Protection Act (R. S. C., 1927, c. 140, s. 12).

[29] Municipal Improvements Assistance Act, S. C., 1938, c. 33, s. 9(2); Public Service Staff Relations Act, S. C., 1966-67, c. 72, s. 19(2). During consideration of the latter Bill in the Special Joint Committee of the Senate and the House of Commons on Employer-Employee Relations in the Public Service of Canada, Mr. Bell sought the distinction between "regulations" and "regulations of general application." Mr. J. D. Love, Assistant Secretary (Personnel) of the Treasury Board, suggested that this would have to be looked into, but the matter did not arise again. (Proceedings, November 22, 1966, pp. 933-934.)

[30] Radio Bill, H. of C. Debates, May 31, 1938, p. 3406. During consideration of the 1914 Dairy Products Bill the suggestion was made

that, because "not one Canadian farmer in ten thousand ever sees the Canada Gazette," regulations should be published also in local newspapers. The Honourable Martin Burrell, Minister of Agriculture, replied that "the department will be very glad, of course, to do that." However, no statutory provision was made. (H. of C. Debates, May 1, 1914, p. 3170.)

When the Canada Labour (Standards) Code Bill was before the Senate Committee on Banking and Commerce, an unsuccessful attempt was made to insert the requirement of affirmative resolution. The suggestion was not discussed. (Proceedings, March 10, 1965, p. 189.)

[31] Public Works Construction Bill (S. C., 1934, c. 59), Seed Grains Loan Guarantee Bill (S. C., 1937, c. 39), and Unemployment Relief and Assistance Bill (S. C., 1936, c. 15).

[32] Ibid., ss. 9, 9, 8, respectively.

[33] H. of C. Debates, May 14, 1948, p. 3951. A moment earlier, Mr. Macdonald (Cons.) had asked if Parliament would have power to alter a tabled order or regulation. (P. 3949.) There was no reply.

[34] Ibid., April 24, 1919, pp. 1691-92. The Act was replaced in 1955 (S. C., c. 29) but the earlier debate quoted here is of interest.

[35] H. of C. Debates, April 24, 1919, p. 1693.

[36] Veterans Affairs Department Bill, H. of C. Debates, June 15, 1944, pp. 3848-51.

[37] During debate of another bill, the Atomic Energy Control Bill, H. C. Green (Cons.) suggested the inclusion of an annulment provision. Hon. C. D. Howe, Minister of Reconstruction and Supply, thought that "the point is covered" by the tabling requirement. "It would be within the privilege of any member," he added, "to bring any regulation before the house for discussion." (H. of C. Debates, June 10, 1946, pp. 2373, 2401.)

[38] In one case, tabling was required only in the House of Commons, and in two cases it did not have to occur until the beginning of the next session. One statute specified no time limit for a motion to annul, one required a "joint resolution," two required passage of the resolution by either house, and one specified passage by the House of Commons. The Exchequer Court Act provided not only for the annulment of regulations but also for their temporary suspension either by the Governor-in-Council (by proclamation published in the Canada Gazette) or by one house (by "address"). Suspension was effective until the end of the next session of Parliament. (R. S. C., 1952, c. 34, s. 88[3].) The Admiralty Act provided that regulations could by "joint resolution of both Houses of Parliament, be suspended or repealed." However, the

duration of a suspension was not specified. (R. S. C., 1952, c. 1, s. 31[4].)

[39] S. C., 1959, c. 46, s. 87. H. of C. Debates, May 28, 1959, p. 4114.

[40] H. of C. Debates, June 2, 1959, p. 4254.

[41] Railway Belt Water Act (S. C., 1926, c. 15, s. 4).

[42] Mr. Diefenbaker tried to include the requirement in the Food and Agriculture Organization of the United Nations Bill. (H. of C. Debates, October 11, 1945, pp. 970-971.) Senators Dickey and Alexander attempted to add a similar provision to the Supreme Court Bill. (Senate Journals, April 16, 1875, pp. 279-282.) See above, n. 30, for the third attempt.

[43] S. C., 1928, c. 44.

[44] H. of C. Debates, April 10, 20, 1928, pp. 1879-80, 2216-23. Senate Debates, April 26, 1928, pp. 354-356.

[45] H. of C. Debates, April 10, 1928, p. 1879.

CHAPTER IV

CONTROL EXERCISED BY THE EXECUTIVE

Although the major purpose of this study is to consider those methods of scrutinizing and controlling subordinate legislation which are exercisable by Parliament, some attention must be given to control which can be exercised by other agencies if the whole question of scrutiny is to be viewed in a broad perspective.[1]

The need for parliamentary control does not absolve the executive branch of government of responsibility to ensure that regulations meet standards which are acceptable to Parliament and ultimately to the public. These standards apply not only to the content of regulations but also to the procedures for making them. Furthermore, the executive must accept a major part of the responsibility for the wording of enabling legislation.

Indeed, the mere existence of a regular procedure for parliamentary scrutiny of regulations will likely have a salutary effect on the executive role. In the picturesque language of G. W. Baldwin, perhaps the most persistent advocate of such scrutiny, "the main function of . . . [a scrutiny committee] will be to put the fear of God into the people who draft the regulations, so there will always be this sword of Damocles hanging over them."[2]

Executive control of the regulation-making process occurs at both the bureaucratic and political levels. Public servants draft subordinate legislation and, for regulations subject to the Statutory Instruments Act (Regulations Act, before 1971), examine it according to established criteria. The cabinet or individual ministers (and in some cases, other agencies) "make" the regulations. The degree and nature of the control which the political executive actually exercises, however, would in most cases be difficult to determine, and it is commented upon only briefly in this Chapter.

The drafting of enabling clauses cannot be completely separated from the regulation-making process, inasmuch as these clauses establish the framework within which subordinate legislation is made. Indeed, this close link prompted the House of Commons to expand the terms of reference of the Committee on Statutory Instruments.[3] It is true, of course, that the legislature plays a role before enabling legislation becomes law. However, because the main responsibility rests with the executive, the executive role may appropriately be considered at this point.

Changes in executive control which have followed in the wake of the Statutory Instruments Committee's study are discussed in Chapter VIII.

A. The Wording of Enabling Legislation

Justice Minister Turner told the Statutory Instruments Committee that "if one is concerned with the control of delegated powers, one cannot logically fail to be concerned with the terms on which these powers are granted."[4] He hoped that his Department would "take a more positive responsibility for the content and form and substance" of enabling legislation. He added that

> there should be guide-lines available by which one can examine, objectively, requests to Parliament for the granting of legislative power in the first place.
>
> Your Committee will be interested in establishing a Parliamentary review procedure, I should imagine. To our minds that is going to be insufficient, if your Committee does not interpret its terms of reference in an elastic fashion to go to the granting of that power in the first place. We would welcome whatever guidelines this Committee deemed advisable to set up.[5]

Although Parliament is ultimately responsible for the content of statutes, this content generally expresses the wishes of the sponsoring ministers or of the cabinet as a whole. When one considers the variations in terminology of enabling sections it would seem that the Government has in the past paid insufficient attention to wording. Illustrations drawn from the Third Report of the Statutory Instruments Committee are useful to demonstrate this point.[6] Authority to make regulations has been explicitly stated ("The Governor in Council may make regulations") or implied ("Such farm stations shall be under the direction and control of the Minister, subject to such regulations as are made by the Governor in Council"). This authority has been to make "regulations" or "rules," or to do something by "order," "proclamation," or "by-law." Frequently, the power has been expressed in terms of the action to be taken, such as to "prescribe," "define," "exempt," "require," "fix," "prohibit," "establish," or "specify," without an indication of the method to be used. Of course, this has made it more difficult to determine whether or not the action is legislative in nature.

Use of the term "regulation" in delegations would at least establish what documents are to fall within the purview of the Statutory Instruments Act. This would be analogous to the practice in Great Britain for statutes enacted after the passage of their Statutory Instruments Act in 1946.

A second indication that closer attention is due the wording of enabling clauses related to Driedger's distinction among authority to make specific regulations, regulations to accomplish a specified purpose, and regulations in relation to a specified subject matter.[7] During none of the debates or committee proceedings read for the present study did this writer detect any awareness that these variations in wording might in fact represent different degrees of generality of delegated power. The significance of wording was pointed out to the Statutory Instruments Committee by Assistant Counsel Morden.[8] It was also explicitly acknowledged by the Government in the document entitled "An Analysis of the Grant of Power to make Regulations" submitted to the Committee by Privy Council President Donald Macdonald.[9] The Statutory Instruments Committee rightly suggested that "Mr. Driedger's useful analysis of apparently insignificant language should be borne in mind by Members of Parliament when considering enabling provisions of Bills" inasmuch as this language "is highly relevant to determining the scope of a statutory power."[10]

A third body of evidence which suggests that the wording of enabling clauses needs more careful consideration is the miscellany of expressions used to confer power to carry out an Act's provisions."[11]

Finally, the executive should wherever possible avoid skeletal legislation--statutes which leave their real content to regulations. A former Justice Minister, the Honourable Guy Favreau, stated that:

> Nos lois ressemblement de plus en plus à des préambules, les clauses détaillées restant à être rédigées et amendées à volonté par des experts de la fonction publique.[12]

When officials of the Department of Justice appeared before the Statutory Instruments Committee, Mr. Morden asked if they had "general working criteria" when they draft enabling clauses. He mentioned specifically clauses designating recipients of delegated power, authorizing regulations which amend another statute or which define terms in the parent statute, authorizing the subdelegation of regulation-making power, authorizing regulations which have retrospective effect, and authorizing such regulations as the Governor-in-Council or a minister "deems necessary" to carry out the purposes of a policy.[13] The "absolutely, sir" reply and the supporting comments made by Associate Deputy Minister of Justice D. S. Thorson[14] lead to the conclusion that the intent of enabling clauses, as distinct from the sometimes bewildering miscellany of specific expressions of that intent, is carefully considered.

This does not mean that the intent is always consistent with the principle of accountability. The following frank statements of Mr. Turner[15] could belie the impression created by Mr. Thorson:

> Sometimes the pressure of the moment prompts you to open the drawer of your precedents . . . . If a precedent exists in legislation that has not been disapproved by Parliament, there is a tendency for it to recur in other legislation . . . having nothing to do with the original statute. . . . This is a matter of success breeding that sincerest form of flattery, imitation. Those of us on both sides of the House who have had the responsibility for piloting bills, know that when you get

> in a tough spot and somebody asks you about where that clause comes from, you reply that it is a standard clause, and you get away with it.
>
> What happens in practice at the moment is that there is within every executive branch of every government, I assume, the urge toward efficiency, and against it the feeling of preserving civil rights and the citizen's rights of appeal and so on. It is quite natural for a deputy minister of an operating department to want to extend the administrative authority of his ministry as widely as possible. There are also--and this we have to combat--around any table of ministers, I suppose in any type of government, those who favour efficiency and who would prompt rather wide delegation and those who are concerned about the extent of that delegation because of what it does to the ordinary citizen.
>
> Depending on the government, depending on the time and depending on the shifting alliances within the government, often one minister will support another in a particular aspect of a discussion because he knows he has a wider power and he is going to try to get [it] through in two weeks.

He added, however, that he intended to use his authority under "the statutory umbrella and . . . the regulatory framework"[16] more positively than had been done by his predecessors.

B. The Drafting of Regulations

In the words of the Committee on Ministers' Powers:

> The importance of good drafting cannot be over-emphasized, and the more resort to delegated legislation is practised by Parliament, the more necessary is it that its draftsmanship should be uniformly good. . . . Prevention is both better and less expensive than cure . . . . But the value of good drafting is not limited to the avoidance of illegalities. In the ordinary life of the community what is above all important is that legislation, whether delegated or original, should be expressed in clear language.[17]

Question fourteen of the questionnaire[18] prepared by the Statutory Instruments Committee and distributed to 120 departments and other agencies, asked:

> Who drafts your regulations--a departmental solicitor, a Department of Justice solicitor, a departmental officer who is not legally trained, or some other person? If there are variations in the practice in this respect under different statutes, please specify.

The replies indicated that only about a dozen agencies did not use legally-trained personnel at some stage of the drafting process. The other agencies employed either their own or Justice Department solicitors. Some agencies indicated that the answer depended upon the type of document being made. For example, the Treasury Board and the Penitentiary Service stated that a Justice solicitor was used for regulations falling under the Regulations Act, but that personnel without legal training drafted other documents.[19] The wording of the question may not, however, have elicited responses from some agencies in relation to documents which in their view did not come within the terms of the Regulations Act.

It should be pointed out that the Committee's questionnaire referred to regulations "administered" by, not "made" by, departments and other agencies. The reason was doubtlessly the fact that regulations which were formally made by the Governor-in-Council, the main recipient of delegated power, were drafted by other authorities and approved by the responsible ministers before they were forwarded to the cabinet for enactment.

Legal training alone does not a qualified draftsman make. "There is a wealth of difference between being skilled counsel and being a skilled draftsman," said Turner as he commented that one could count "on two hands" the number of skilled draftsmen in Canada.[20] In view of the importance of good drafting, why were all regulations not drafted by the department of Justice? Turner explained that there was insufficient "experienced manpower" in his Department, and that

> experience has proven that the drafting of regulations, in particular regulations dealing with the technical aspects of administration, must be done by working very closely with the department involved and the department responsible for the actual operation.[21]

The practice of "seconding" lawyers from the Department of Justice to other departments should help, however, to solve the problems. Even then, said C. K. Kennedy (Assistant Counsel, Department of Transport), "we must keep the technical people close to the regulations at all times."[22] R. E. Williams, Legal Adviser to the Department of Manpower and Immigration, stressed the effort required in the drafting process:

> The drafting process itself is one that involves frequently the most senior departmental officials and in every case involves long meetings and the preparation of many drafts before a final draft that is satisfactory to both the Departments as to content and the draftsman as to form is arrived at.[23]

Mr. Turner hoped that training seminars for drafting regulations would soon be started to aid Justice Department solicitors attached to other departments. This would also mean, he said, that

> there would be more time available, at all levels in the preparation of regulations by Justice officers to consider matters of real substance arising out of proposed regulations instead of having, because of the force of time to be limited to form and draftsmanship.

Indeed, he had already instructed his Department "to review this whole process so that we would take a more positive responsibility for the content and form and substance" of both regulations and enabling legislation.[24]

Any discussion of the drafting of regulations must consider the role played by non-governmental groups. While few Canadian statutes require prior consultation with interest groups,[25] contact between the bureaucracy and groups appears to be common practice. Indeed, Presthus speaks of a "sustained interaction" among the bureaucracy, interest group leaders, and legislators. He also notes that most groups focus their attention on the bureaucracy rather than the cabinet.[26] One reason for this focus is, of course, the significant role played by the bureaucracy in the regulation-making process.

Inasmuch as the effective administration of a law is predicated upon public awareness and acceptance, it follows that any action which facilitates awareness and acceptance merits consideration. Statute law is publicized through public debate in Parliament and coverage by the media; and the lapse of time between the introduction and final passage of a bill is usually sufficient for reaction by the public and, of course, all parties in Parliament. Sometimes the Government introduces a bill to test public opinion, but does not pursue the bill beyond the committee stage in order that this opinion can be assessed. Revised legislation is then presented at the next session.

Regulations, on the other hand, are not made in public, are rarely subject to parliamentary discussion, and generally are either in force or about to become effective by the time they are published in the Canada Gazette. Occasionally, the overhaul of the regulation structure of an important statute is preceded by prolonged committee hearings, and sometimes also by a White Paper. A well-known recent example is the 1966 White Paper and 1967 joint parliamentary committee study which preceded revision of the Immigration Act regulations.

Some form of consultation is important, both as a means of providing the regulation-making body with the necessary technical or other information, and as a means of giving affected groups and individuals the feeling that they are part of the legislative process. However, the rule-making process should not become democratized to the point where consultation requirements are so burdensome "that rules will either not be made or policy will be driven underground, as it were, and remain inarticulate or secret."[27]

The Statutory Instruments Committee asked the following question of all regulation-making bodies:

> 11. Does your Department or Agency consult interested or affected persons when preparing regulations so as to obtain their views with respect to the scope and content of the regulations? If so, please advise as to the procedures used, formal or otherwise, for obtaining or implementing this consultation.

The replies indicated that with few exceptions there was prior consultation--a direct contradiction of Driedger's statement that "normally there is no consultation with any persons outside the public service."[28] Most consultation was informal and consisted of meetings, correspondence, questionnaires, and telephone calls; but some was formal.[29] The Treasury Board and three branches of the Department of Transport stated that they circulated drafts of proposed regulations to affected groups for comments.[30] Advisory committees were used by the Unemployment Insurance Commission, the Farm Credit Corporation, and the Canadian Livestock Feed Board.[31] Perhaps, then, the comment of H. W. R. Wade in relation to Great Britain applies also to Canada: "Consultation before rule-making though usually not required by law, is in fact one of the major industries of Government."[32]

Inasmuch as consultation in one form or another appears to be common practice in Canada, what would be the advantage of making it mandatory? The general requirement of antecedent publicity was abandoned in Great Britain with the passage of the Statutory Instruments Act in 1946, although many individual statutes require certain forms of consultation. According to Garner,[33] consultation (whether voluntary or required) in Great Britain usually involves the sending of draft regulations and explanatory comments to affected groups with an invitation to make observations within a given time. The decision whether to act upon a request from an organization for a meeting with the minister or his representatives "will depend on the status of the organisation concerned, the intrinsic importance of the matter in issue, and (in some cases) the political implications of the subject." After the observations of groups are made, the department decides whether or not to amend the draft. H. W. R. Wade has suggested that in view of this widespread consultation "it is doubtful whether anything would be gained by imposing more general legal obligations and formal procedures."[34] Ontario Chief Justice McRuer adds that "compulsory antecedent publication and consultation would cause unnecessary delay and merely duplicate the time already spent in informal consultation."[35]

The type of consultation practised in any jurisdiction will obviously depend upon a number of factors, such as the degree to which affected or interested groups can be identified, their size, the type of regulations, and the nature of the regulation-making authority.

Perhaps of greatest difficulty is meaningful consultation when the affected group is the public generally or a large portion of it. Because individuals are less likely than organized groups to present their views to agencies making regulations or, indeed, even to know that the making or revising of regulations is being contemplated, attention must be given to devising appropriate methods for ascertaining the views of individuals. Informal public hearings, publicly announced in advance and open to all interested persons, may be one of these methods. Professor Abel thought that members of Parliament could play an important liaison role between departments and constituents "for establishing the contact in this consultative arrangement."[36]

Abel told the Statutory Instruments Committee that, in his view, Canada needed "a more regularized way of advance consultation on the terms and substance of . . . regulation[s]." He proposed that the Governor-in-Council establish categories of consultation and, with the advice of agencies which make regulations, allocate types of regulation-making powers among the several categories.[37] He acknowledged, however, that the making of some kinds of regulations would require no advance consultation.[38]

C. Examination of Regulations Subject to the Regulations Act

The Regulations Act and regulations made pursuant to it required that every regulation, as defined by the Act, be submitted in draft form to the Clerk of the Privy Council "who shall, in consultation with the Deputy Minister of Justice examine the same to ensure that the form and draftsmanship thereof are in accordance with the established standards." Every such regulation also had to be submitted within seven days of its making to the Clerk of the Privy Council who was to record and number it.[39]

In addition, the Bill of Rights and its regulations required that every regulation submitted for Privy Council examination be transmitted in draft form by the Clerk of the Privy Council to the Minister of Justice who would determine whether any of its provisions were "inconsistent with the purposes and provisions" of the Bill of Rights. The Minister was to report any inconsistency to the Clerk of the House of Commons and the Clerk of the Privy Council "at the earliest convenient opportunity."[40]

What were the criteria used to examine regulations "caught" by the Regulations Act? "In relation to Statutory Instruments the main function of my office," said J. L. Cross (Assistant Clerk of the Privy Council), "is to ensure that the requirements of the Regulations Act, the Canadian Bill of Rights and the Regulations made thereunder are met."[41]

The actual examination of draft regulations was performed by Mr. Paul Beseau, Legal Adviser to the Privy Council Office. Mr. Beseau told the Statutory Instruments Committee that before he could approve regulations "as to form and draftsmanship" he had to "review them carefully to understand just what they are trying to do in their proposals." He added:

> Quite often that requires lengthy consultations with officials in the particular department putting them forward. On any particular set of regulations this may require three, four, or sometimes ten meetings with the officials in order to get the precise intentions expressed in the regulations. In others

> they will be shorter and consultations will not be required at all.[42]

Examination was evidently worthwhile.

Although the regulations made under the Regulations Act required that the form and draftsmanship of regulations be "in accordance with the established standards," the Statutory Instruments Committee was told that this meant "high standards of legislative drafting generally" --that no specific standards had been laid down.[43] However, "form and draftsmanship" was interpreted to include legality. Indeed, Beseau stated that "the most important function [of his examination would be] to insure that the regulations fall within the powers delegated by Parliament."[44] He noted, also, that he regarded as ultra vires proposed regulations which had retroactive effect or which delegated regulation-making power, unless there was specific statutory authorization.[45] Only rarely did questions of policy arise in the course of examination, although he acknowledged that "it is a pretty fine line as to whether something is substance or form." He added that

> matters that I consider might have serious implications in the field in which they are dealing, I might well raise with the Department and say that I think they should reconsider it or at least it should be brought to the attention of their Minister.[46]

Draft regulations were examined by Beseau for compliance with the Bill of Rights at the same time they were reviewed as to form and draftsmanship. He was satisfied that his own interpretation of the Bill of Rights was sufficient for this purpose and that because the Bill "appears to be very clearly written," more precise guidelines were unnecessary. To this comment he added the following incredible statement:

> It is a matter of looking to court decisions, if there is doubt, and what the courts have decided in a particular area. Otherwise, it seems to me that most people can read the Bill of Rights and arrive at a fairly well-defined idea of what the Bill of Rights says.[47]

And yet, it was upon Beseau's recommendation that the Minister of Justice approved draft regulations.

The most frequent violations of the Bill pertained to the requirement of a fair hearing when rights were to be withdrawn, and the proscription of discrimination. Beseau added, however, that

> I very seldom have problems with the officials in departments when I point out to them that this section as drafted appears to be contrary to the Bill of Rights and it would never receive my approval. They immediately start to reconsider the matter and find a suitable way of arranging for notices to be sent out and provide for a hearing, that type of thing.[48]

After the draft of a regulation was acceptable to both Beseau and the regulation-making authority, it was stamped to indicate approval as to form and draftsmanship. It was then returned to that authority which then made its final submission to the Privy Council Office. At that time the regulation was certified by the Minister of Justice (through the Deputy Minister) signifying compliance with the Bill of Rights. Beseau explained that he could recommend approval under the Bill of Rights at the same time that he examined it for form and draftsmanship, "but I find it a very useful check to make sure the departments are not changing my draft from the time I send it back to them until it is going forward to be enacted, and upon occasion I do find this."[49] There was obvious need for control within the bureaucracy.

Section 9 of the Regulations Act permitted the Governor-in-

Council to exempt a regulation from, among other things, transmission to the Clerk of the Privy Council, but it did not explicitly exempt the regulation in its draft form from examination as to form and draftsmanship. Nevertheless, such exemption was apparently assumed by the Privy Council Office.[50]

If executive scrutiny is to be successful, sufficient well-trained staff is required. At the time Beseau appeared before the Statutory Instruments Committee he was the only person reviewing regulations from all departments, although someone else looked after proclamations.[51] Justice Minister Turner acknowledged that the heavy work load resulted partly from the volume of regulations to be reviewed and partly from a lack of training and experience of many officials who initially drafted regulations.[52] Mr. Cross commented that the task of review would be facilitated even if regulation-making authorities "took the time to read" the suggestions prepared by his office for their guidance.[53]

D. Documents not Examined under the Regulations Act

Documents which were not submitted for Privy Council scrutiny under the Regulations Act were of four kinds:[54] first, those explicitly excluded (s. 2[a][iii]-[vi]) by the Act's definition of the term "regulation"; second, instruments made under the authority of the Crown prerogative and therefore not under authority "conferred by or under an Act of Parliament"; third, regulations exempted under Section 9 of the Act.[55] (The question was raised above as to whether these regulations were in fact legally exempt from examination as to form and draftsmanship.)

The fourth type of document which was not submitted for examination included instruments which were not "made in the exercise of a legislative power" (s. 2[a][i]). It is difficult to establish what in fact constitutes a "legislative" power, and yet the interpretation of this word by departments and other agencies determined whether or not documents were examined under the terms of the Regulations Act and Bill of Rights.[56] This is of critical importance, because at this point the machinery for internal control broke down. There was no review of interpretations unless the drafting agencies sought the advice of the Privy Council Office. Evidently, this seldom occurred.[57] Fortunately, however, instruments made or approved by the Governor-in-Council had to pass through the Privy Council Office, and this afforded an opportunity to decide whether or not the Regulations Act applied.[58] This writer is unconcerned about those documents which were not, in fact, of a legislative nature. He is alarmed, however, by the absence of any procedure to ensure that regulations as defined by the Regulations Act could not escape the requirements of that Act.

To what extent might regulation-making authorities have been issuing documents of a legislative nature which were not viewed as regulations defined by the Regulations Act? The following questions from the Statutory Instruments Committee's questionnaire sought to elicit this information:

> 1. With reference to the different types of subordinate legislation which comes under the Administration of your Department or Agency
>
> . . . .
>
> (d) Does your Department issue other rules, orders, instructions, not included within the terms of the Regulations Act--

which affect the public? If so, about how many, including amendments, were issued during 1968?
(e) Does your Department issue other rules, orders or instructions, not included within the terms of the *Regulations Act*, which affect only your own Department? If so, about how many, including amendments, were issued during 1968?

. . . .

10. Does your Department or Agency issue documents in the nature of policy statements or position papers which are used by your Department or Agency to implement policies under legislation administered by it? If so, please specify. If so, what steps are taken to bring such documents to the attention of interested or affected persons?

About half of the answers to these questions were in the affirmative, and they stated that the issuing authorities regarded the documents as being of an administrative nature. However, several of the replies implied that some of the documents could have been classified as legislative. For example, the response of the Marine Regulations Branch of the Department of Transport to question ten stated, in part: "We expect that eventually, after we gain further experience, these [documents] will be converted into regulations."[59] The Department of National Health and Welfare pointed out very clearly the problem which many regulation-making agencies must have, or at least should have, encountered:

> It has been found to be extremely difficult to produce an effective answer to paragraph (e) of Question 1. The work and responsibilities carried on by the Department in several areas in both the health and welfare fields . . . entail almost constant instruction and amendment to instruction. . . . But it is almost impossible to distinguish in some instances between an instruction issued in the day-to-day administration of the work and an instruction that could be regarded as supplementing legislation. It is more difficult still in retrospect to distinguish between instructions which may affect the public and those which do not affect the public but which affect only the Department.[60]

Other documents were interpretations of legislation and were, therefore, in the opinion of Mr. Morden, of a legislative nature.[61] Furthermore, in Mr. Beseau's view, regulations of a legislative nature made pursuant to a subdelegated power should have been subject to the requirements of the Regulations Act. However, "very few" of them were submitted for approval.[62]

When representatives of the Department of Manpower and Immigration appeared before the Statutory Instruments Committee, there was much discussion whether directives relating to the exercise by immigration officers of their discretionary authority were in fact legislative in nature and therefore subject to the Regulations Act. The Committee's concern is discussed later in this study.[63]

Mr. Morden suggested that, in view of the fact that the list of exemptions under Section 9 of the Regulations Act had not been altered since 1954, the replies to the questionnaire "perhaps indicate" deliberate de facto exemption of certain documents by regulation-making authorities.[64] Beseau seemed to think that greater use should be made of Section 9--he referred specifically to certain documents issued by the Department of Transport which were "extremely technical," "limited to a very specialized field," amended frequently, and "brought to the attention of the people interested in them." He then added this significant statement: "at present there is no way I can possibly review them anyway."[65] Greater use of Section 9 would ensure that there was public record of the documents exempted, facilitate parliamentary inquiry, and keep the door open for possible legislative scrutiny.

E. Regulations and the Political Executive

The political executive is responsible for making or approving all regulations with which this study is concerned. In the first place, seventy-eight of the 1967-68 statutes-in-force delegated authority to agencies other than the cabinet or government departments, with the stipulation that the exercise of this power either receive cabinet or ministerial approval or be subject to executive disallowance.[66] It should also be noted that, to secure cabinet approval, regulations have usually been routed through the responsible minister "except where statutory authority permits the regulation making authority to make the recommendation directly to the Governor in Council."[67]

Second, seventeen of the statutes-in-force in 1967-68 provided that the exercise of delegated authority by individual ministers was subject to cabinet approval.[68] Third, regulations made by the Governor-in-Council have been presented to the cabinet as recommendations "over the signature of the responsible minister. If the action recommended involves areas of responsibility of other ministers, the recommendation will indicate, by their signatures, the concurrence of these ministers."[69] Fourth, many statutes authorized individual ministers to make regulations without further approval.

The degree to which ministers or the cabinet actually scrutinize regulations which they officially make or approve would be most difficult to determine. The extent of this review probably depends in large measure upon the time available and the importance (including the political significance) of the regulations. In recent years, for example, the regulations made under the Immigration Act and the War Measures Act have been among the more politically sensitive.[70]

Perhaps the nearest one can come to a generalization is indicated by the following statements. It will be recalled, for example, that Prime Minister St. Laurent said during debate of the Regulations Bill that delegation to the Governor-in-Council "gives considerable time for checking."[71] A decade later, the Honourable J. W. Pickersgill suggested that the thoroughness of cabinet scrutiny depended upon the individual minister who made the recommendation:

> If the minister is forceful or if he is trusted there is apt to be little question raised in the Cabinet about his proposals for delegated legislation. On the other hand with a weak minister, or a controversial question, other members of the Cabinet are apt to take a good deal of interest in the proposals of a legislative character.[72]

Privy Council President Donald Macdonald told the Statutory Instruments Committee that "it is almost impossible for the Governor in Council . . . to examine proposed regulations even superficially."[73] Finally, the Deputy Minister of Justice, writing for the Honourable Otto Lang, noted that "much depends on the subject matter of the regulations and the time available to the Minister or Cabinet."[74]

F. Conclusion

Although the executive branch of government undoubtedly has a role to play in any system established to control subordinate legislation, it has been shown that problems were associated with the performance of that role. These problems began with the imprecision of enabling clauses themselves, and they were also linked to the bargaining within cabinet which Justice Minister Turner described. The Minister's resolve to use his authority more positively than had been done by his predecessors was, therefore, encouraging.

It has also been shown that checks existed within the executive, probably more within the bureaucracy than at the ministerial or cabinet level, for controlling regulations themselves, and that these checks imposed limits on bureaucratic zeal. However, the obviously thorough examination conducted by the Legal Adviser to the Privy Council Office under the Regulations Act was weakened, both by the inadequacy of staff and by the fact that only those instruments which were voluntarily submitted by departments and other agencies were reviewed. Furthermore, Mr. Beseau's remarks to the Statutory Instruments Committee leave the impression that more precise guidelines were needed for the examination of regulations under the Bill of Rights.

Nevertheless, in spite of its weaknesses, executive scrutiny was an important part of the over-all control machinery. But it could not be an adequate substitute for parliamentary review.

Footnotes

[1] The Report of the Government of Canada's Royal Commission on Government Organization suggested that safeguards should be sought in all three branches of government. (Canada, Royal Commission on Government Organization, Report [Ottawa: Queen's Printer, 1963], vol. 5, p. 94.)

[2] Statutory Instruments Committee, Minutes, April 22, 1969, p. 22. Baldwin was arguing that a scrutiny committee "will only touch the very surface" of regulations, and that the very presence of a committee would be valuable. Professor Brown-John reported the following contrary opinion expressed in 1961 by Hon.J. W. Pickersgill: "I . . . would be very much afraid that a government would be more careless in the use of delegated powers if it felt that a committee of either House of Parliament had the duty of policing it, particularly if it was a committee of the House of Commons where the government supporters would necessarily be in the majority." (Letter to Brown-John, September 19, 1961, quoted in C. L. Brown-John, "Parliamentary Supervision of Delegated Legislation in Canada " [unpublished B. A. thesis, University of British Columbia, 1962], p. 30.)

[3] See below, p. 74, and n. 5.

[4] Statutory Instruments Committee, Minutes, June 27, 1969, p. 229.

[5] Ibid., p. 227. See also his statement on p. 229. On July 10, 1969, the Committee's terms of reference were expanded by the House of Commons: "To consider and, from time to time, to report on the adequacy of existing statutory authority for the making and publication of Statutory Instruments and on the adequacy of existing procedures for the drafting, scrutiny, and operational review of such instruments, and to make recommendations with respect thereto." (H. of C. Debates, July 10, 1969, p. 11,085.)

[6] Statutory Instruments Committee, Third Report, pp. 30-32.

[7] See above, pp. 38-42, for a brief consideration of this distinction.

[8] Morden, "Survey," pp. 33-34.

[9] Statutory Instruments Committee, Minutes (Appendix "J"), October 7, 1969, pp. 256-261.

[10] Statutory Instruments Committee, Third Report, p. 31.

[11] See Chapter II, n. 38.

[12] Speaking to the Lawyers Club of Toronto, January 11, 1965. Quoted by Gilles Pépin, "A report on Some of the Writings in the Field of Delegated Legislation (Part Two: 'Les principaux problèms signalés par les auteurs')," 1969, p. 1. This Part of the "Report" is part of Exhibit PP of the Statutory Instruments Committee.

[13] Statutory Instruments Committee, *Minutes*, June 27, 1969, pp. 240-242.

[14] *Ibid*.

[15] *Ibid*., pp. 229, 237-238.

[16] Turner was referring, presumably, to authority contained in the Canadian Bill of Rights and the regulations made under it; and in the regulations made under the Regulations Act.

[17] "Report of Committee on Ministers' Powers," p. 50.

[18] The questionnaire appears as Appendix D to this study. See Statutory Instruments Committee, *Minutes* (Appendix "C"), April 22, 1969, pp. 46-47.

[19] Statutory Instruments Committee, Exhibit QQ, (untitled), pp. 1262 and 1515.

[20] Statutory Instruments Committee, *Minutes*, June 27, 1969, p. 227.

[21] *Ibid*., p. 225.

[22] *Ibid*., June 19, 1969, p. 164.

[23] *Ibid*., June 26, 1969, p. 176.

[24] *Ibid*., June 27, 1969, p. 227.

[25] Only two of the statutes in force in 1967-68 required advance consultation. The Grain Futures Act (*R. S. C., 1952*, c. 140, ss. 5[2], 8[4]) and the Broadcasting Act (*S. C., 1967-68*, c. 25, s. 16[2]) stipulated that affected or interested persons must be given an opportunity to make representations once they had been informed of proposed regulations. Several, although not all, of the Harbour Commissioners Acts required that Commission by-laws be served upon the clerks of the affected municipalities at least ten days before submission for approval by the Governor-in-Council. Whether or not this is consultation is questionable.

Seven bills on the 1969-70 Order Paper, six of which became law, provided that affected persons must be given the opportunity to make representations to the regulation-making authorities following the publication of proposed regulations. At least one other 1969-70 statute (the amendment to the Territorial Sea and Fishing Zones Act, c. 68, s. 4) required the publication of proposed regulations at least sixty days before they became effective. However, it made no provision for representations.

[26] Robert Presthus, *Elite Accommodation in Canadian Politics* (Toronto: Macmillan of Canada, 1973), pp. 211-212.

[27] *Report of the [U. S.] Attorney General's Committee on Administrative Procedure*, 225 (1941), quoted by B. Schwartz, *An Introduction to American Administrative Law* (New York: Oceana Publications, 1962), p. 56, in "A Report on Some of the Writings in the Field of Delegated Legislation [Part One: 'A "montagne" of selected materials']," ed. by Gilles Pépin, 1969, p. 122. This Part of the "Report" is part of Exhibit PP of the Statutory Instruments Committee.

[28] E. A. Driedger, "The Enactment and Publication of Canadian Administrative Regulations," *Administrative Law Review*, XIX (1966-67), p. 129. Driedger was at that time Deputy Minister of Justice and Deputy Attorney General of Canada.

[29] A representative of the Canals Division of the Department of Transport, G. E. Easton, told the Statutory Instruments Committee that "we have our ear to the ground." (*Minutes*, June 19, 1969, p. 157.) The River St. Lawrence Ship Channel Branch of the Department of Transport wrote of "semi-formal" meetings. (Exhibit QQ, p. 1425.)

[30] Air Regulations and Licensing Branch (Statutory Instruments Committee, *Minutes*, June 19, 1969, p. 154); Marine Regulations Branch (Exhibit QQ, p. 1424); Marine Traffic Control Branch (Exhibit QQ, p. 1425).

[31] Statutory Instruments Committee, Exhibit QQ, pp. 230, 768, 664.

[32] H. W. R. Wade, *Administrative Law* (Oxford: Clarendon Press, 1967), p. 317, quoted by Statutory Instruments Committee, *Third Report*, p. 47.

[33] J. F. Garner, "Consultation in Subordinate Legislation," *Public Law*, 1964, in Pépin, "A Report" (Part One), p. 136.

[34] H. W. R. Wade, *Administrative Law*, 1967, p. 317, quoted by Statutory Instruments Committee, *Third Report*, p. 47.

[35] Ontario Royal Commission Inquiry into Civil Rights, *Report Number One*, volume 1, p. 364. McRuer was, of course, referring specifically to Ontario.

[36] Statutory Instruments Committee, *Minutes*, May 1, 1969, p. 72.

[37] Ibid., pp. 66, 69. He thought the following categories of consultation might be appropriate: the "investigative," which consists mainly of correspondence inquiries addressed to interested parties; the "consultative," which stresses the use of advisory committees or, in their absence, "operating groups in the area"; the "conference," which involves meetings to discuss the content of regulations; and the "adversary," which is more of a formal hearing. (P. 67.)

[38] Ibid., p. 67. He cited the example of prescribing open seasons and game limits, the establishing of various kinds of fees scales, and action required in time of emergency.

[39] Regulations Act, ss. 3(1), 4; and its regulations (November 18, 1954, P. C. 1954-1787), ss. 4-6.

[40] Bill of Rights, s. 3; and its regulations (December 31, 1960, P. C. 1960-1792), ss. 4-7.

[41] Statutory Instruments Committee, Minutes, June 26, 1969, p. 210.

[42] Ibid., p. 212.

[43] Statutory Instruments Committee, Third Report, p. 50. Beseau had stated that "they are normally the standards that apply to the drafting of legislation for the House." (Minutes, June 26, 1969, p. 219.)

[44] Statutory Instruments Committee, Minutes, June 27, 1969, p. 232.

[45] Ibid., June 26, 1969, p. 219. Morden suggested that Beseau's attitude with respect to subdelegation "may be a safe one but it is clear that in some cases even in the absence of express authority the power to subdelegate may be valid." (Morden, "Survey," p. 45.)

[46] Beseau was replying to Morden who asked what he thought about any regulation "that contains, in implementing enabling legislation, a wide measure of discretion on the part of the officer administering the regulation." (Statutory Instruments Committee, Minutes, June 26, 1969, pp. 219-220.)

[47] Ibid., pp. 213-214. His remarks caused no comment.

[48] Ibid. Disputes between Beseau and the legal advisers in departments (most of which advisers had already become attached to the Department of Justice) were settled by the Deputy Minister of Justice or, ultimately, by the Minister himself. (Pp. 214-215.)

[49] Ibid., p. 218.

[50] Ibid., p. 222. Morden thought that the point should be clarified. (Morden, "Survey," p. 58.) The Statutory Instruments Act made the possibility of such exemption explicit. (S. 27[a].)

[51] Statutory Instruments Committee, Minutes, June 26, 1969, pp. 214, 217.

[52] Ibid., June 27, 1969, p. 225.

[53] Ibid., June 26, 1969, p. 212.

[54] Statutory Instruments Committee, Third Report, pp. 18-27.

[55] The Committee was incorrect in its statement that Section 9 was used only in 1954. (Third Report, p. 19.) The first use was on December 21, 1950 (P. C. 6173), and this regulation was amended on February 7 and July 4, 1951. (P. C. 669, 3485.) The 1954 regulation revoked the previous ones.

[56] This was confirmed by Beseau and, for the Department of Manpower and Immigration specifically, by R. E. Williams (Legal Adviser to that Department). (Statutory Instruments Committee, Minutes, June 26, 1969, pp. 223-24, 195.)

By contrast, the New Zealand Regulations Act avoided the problem by defining regulations without requiring them to be of a legislative nature; and the United Kingdom Statutory Instruments Act solved the problem (for statutes made after that Act was passed) by restricting its application to subordinate legislation made in the form of an "order in council" or a "statutory instrument." (Statutory Instruments Committee, Third Report, pp. 12, 14.)

[57] See, for example, Beseau's comments in Statutory Instruments Committee, Minutes, June 26, 1969, pp. 213, 218, and especially 220.

[58] Morden, "Survey," p. 18; Statutory Instruments Committee, Minutes, June 26, 1969, p. 220.

[59] Statutory Instruments Committee, Exhibit QQ, p. 1422.

[60] Quoted by Morden, "Survey," p. 27.

[61] Ibid. He quoted, as examples, replies from the Farm Credit Corporation (p. 24) and the Veteran Welfare Services Branch of the Department of Veterans Affairs (p. 27).

[62] Statutory Instruments Committee, Minutes, June 26, 1969, p. 219.

[63] Ibid., pp. 175-209. See below, pp. 124-125, for the Committee's

concern with this point. Beseau also suggested that certain documents issued by the Department of Transport "are likely regulations within the meaning of the Regulations Act, but I do not get them to review." (P. 224.) MacGuigan had mentioned the possibility of "regulation by the back door." (P. 169.) Morden had similar misgivings about documents prepared by the departments of Indian Affairs and Northern Development, Finance, and Consumer and Corporate Affairs. ("Survey," pp. 27-28.)

[64] Morden, "Survey," p. 28.

[65] Statutory Instruments Committee, Minutes, June 26, 1969, p. 224.

[66] See above, p. 27. Four of the 1969-70 statutes made similar delegations. (Below, p. 163.)

[67] Letter from J. L. Cross, Assistant Clerk of the Privy Council, January 21, 1974.

[68] See above, p. 27. Ten of the 1969-70 statutes required the approval of the cabinet or another minister. (Below, p. 163.)

[69] "Processing of Orders in Council," a document read to the Statutory Instruments Committee by Mr. Cross. (Minutes, June 26, 1969, p. 210.) Twenty-seven of the 1967-68 statutes-in-force, and two statutes passed in 1969-70, made the requirement of a recommendation explicit.

[70] August 16, 1967, P. C. 1967-1616; October 16, 1970, P. C. 1970-1808.

[71] See above, pp. 54-55.

[72] September 19, 1961, letter to C. L. Brown-John, quoted in Brown-John, "Parliamentary Supervision," pp. 61-62.

[73] Statutory Instruments Committee, Minutes, (Appendix "J"), October 2, 1969, p. 258.

[74] Letter from D. S. Thorson, Deputy Minister of Justice, February 18, 1974.

CHAPTER V

CONTROL BY THE JUDICIARY

Subordinate legislation is subject to control by the courts as well as by the legislature and executive. The need for reform of control techniques can be assessed only after all of the existing machinery is known. The purpose of the present Chapter is, therefore, to determine the scope of judicial review.

A reading of the literature in the vast area of administrative law quickly persuades the layman to accept S. A. de Smith's comment that:

> In this "highly acrobatic part of the law" an aptitude for verbal gymnastics is obviously an advantage. The usual meaning of words can be stretched, contorted and stood upside down to suit the purposes of the user. The courts have, indeed, shown a remarkable dexterity in adapting their vocabulary to the requirements of particular situations. To say that the scope of judicial review may be determined by the manner in which the courts classify statutory functions is, no doubt, formally correct; but in many cases the truth of the matter is that the mode of classifying statutory functions is determined by the scope of review that the courts deem to be desirable and practicable.[1]

The problem which de Smith cites appears to centre on the difficulty distinguishing among the several types of delegated power--"legislative," "administrative" (sometimes called "executive"), "judicial," and "quasi-judicial."[2] The reason that distinctions are important is that the scope of judicial review depends to some extent upon the type of function being exercised. Furthermore, as indicated in Chapter III, the requirements of the Regulations Act applied to instruments made "in the exercise of a legislative power." (This is now true of the Statutory Instruments Act.) In the words of the Statutory Instruments Committee, "important legal consequences flow from a characterization that is sometimes very difficult to make."[3]

The goal of this Chapter is, in one respect, a modest one--to understand the role which the courts can play in relation to delegated legislative authority. However, because of the difficulty distinguishing between legislative and administrative functions, some attention must be focused on judicial review of administrative action as well. This goal is more modest than an attempt to determine the actual extent of judicial activity in controlling subordinate legislation authorized by the Statutes of Canada. While this more detailed information would be of considerable value, if would likely entail a review of most cases which have come before the courts--a task not attempted for the present study.

Most of the literature pertaining to judicial review concentrates on administrative and judicial, rather than on legislative, functions. Furthermore, references to court decisions are merely illustrative and are drawn from several jurisdictions. It may be that the apparent lack of attention given in the literature to the volume of cases,[4] together with an absence of comment during the Statutory Instruments Committee hearings and during the debates and other committee discussion read for this study, is an indication that the role of the courts in Canada has not been great in relation to subordinate legislation.

A. The Meaning of Delegated Legislative Power

The criterion often suggested to distinguish between a legislative and an administrative power is the generality of a rule's application. "A power to make rules of general application," say Griffith and Street, "is a legislative power and the rule is a legislative rule. A power to give orders in specific 'cases' . . . or a power to take specific action," is administrative. The weakness of this criterion is the obvious one of trying to distinguish between generality and specificity. Griffith and Street acknowledge that "the matter is finally one for arbitrary decision. There is no answer, save one that is arbitrary, to the old and comparable riddle; 'how many sheep make a flock.'"[5]

The difficulty distinguishing between legislative and administrative functions has been considered by many writers. For example, the Committee on Ministers' Powers concluded that

> it is indeed difficult in theory and impossible in practice to draw a precise dividing line between the legislative on the one hand and the purely administrative on the other; administrative action so often partakes of both legislative and executive characteristics.[6]

Reid notes that this is "an issue upon which both courts and commentators have sometimes thrown up their hands."[7] H. W. R. Wade writes of the "hazy border-line," and states that "in fact it is largely a question of taste where the line is drawn."[8] De Smith, however, suggests that "the term 'legislative' does not give rise to a great deal of difficulty in practice."[9]

Corry has described delegated legislative authority as "an area of free decision in which the presence or absence of certain facts, the relevance of admitted facts, and the present state of the law imposes no fetters on decision. The only guide is policy and expediency." He states that the facts and the public interest should be carefully considered, but that "the responsibility for enforcing such circumspection rests . . . with the cabinet, Parliament, and finally the electorate. Within the area of free decision, the courts have no criteria of sound policy which they can make good against cabinets, legislatures, and electorates."[10]

It would be difficult to quarrel with this statement. Its implication for judicial control seems clear: if the enabling legislation itself is constitutional,[11] the courts can question subordinate legislation only on the ground that it is not authorized by the parent Act. The problem is, of course, that the courts determine whether a given power is in fact legislative. More consistent use by Parliament of the term "regulation" in enabling statutes would help to resolve some of the confusion.

B. Judicial Review of Delegated Legislative Power

What is the legal significance of failure to comply with certain requirements in the making of regulations? In the first place, there seems little doubt that failure to consult with affected bodies before making regulations is, when such consultation is required by the parent Act, fatal to the regulations.[12] Second, the absence of conditions prescribed by the enabling legislation is sufficient to invalidate regulations. It would appear, therefore, that "deems necessary" delegations preclude judicial review.[13] Third, the failure to publish regulations did not under the Regulations Act (and does not now under the Statutory Instruments Act) invalidate them. Fourth, in Driedger's view, the failure to table regulations does not affect their validity.[14]

Of greater significance than these matters of procedure, however, is the substance of subordinate legislation. Do the regulations fall within the terms of the authority delegated by the parent statute? In this case, their validity depends upon the generality of the enabling legislation and, of course, upon the court's interpretation of that legislation. The breadth of power delegated by the Statutes of Canada was discussed in Chapter II. At this point it is necessary to note only that the scope of judicial review varies inversely with the breadth of delegated authority.

Although the courts will declare unauthorized subordinate legislation to be ultra vires, they do not subject the exercise of delegated legislative power to some of the tests which have been applied to the exercise of delegated administrative or judicial authority--tests such as reasonableness, good faith, and natural justice.[15] In other words, "the status of a validly made subordinate law is that of an Act of Parliament,"[16] and the only recourse if the merit of such law is challenged is political--through the principle of ministerial or cabinet responsibility to Parliament.[17] De Smith cautions, however, that regulations "might well" be held to be ultra vires if the court deemed them "outrageous." He adds that their "invalidity would probably not be attributed to unreasonableness *per se*," but rather to "the operation of a common law presumption of legislative intent."[18]

Driedger makes a similar observation when power is not specifically conferred:

> There are presumptions of parliamentary intent--particularly negative presumptions--that do apply to all statutes, and the courts may well use those presumptions to restrict or confine the scope of the Act, and then hold a regulation-making authority within those limits. These presumptions operate in two ways in relation to subordinate legislation--first, to interpret the regulation itself and secondly, to limit the scope of the statute and thus to control the exercise of any legislative power it confers on a subordinate authority.[19]

Reid notes that "a regulation may be unreasonable and *ultra vires* if 'contrary to the spirit' of the legislation." However, it is his opinion that because "the unreasonableness of a statute is unquestionably for Parliament and not the courts to decide, . . . it is difficult to see why delegated legislation should in this respect be treated differently from legislation." He says, however, that "it has been held that" a regulation should not have retroactive effect (presumably without expressed statutory authorization) "if the result would be unreasonable."[20] He was unable to find a case where "bad faith" has been proven.[21]

It should be noted that a regulation which is *ultra vires* is not protected from judicial review because it has been laid before Parliament or has been approved by affirmative resolution.[22] There is some disagreement, however, as to the extent to which regulations are protected by "as if enacted by this Act" clauses. According to

Driedger, "it is clear that they [regulations] are subordinate to the statute under which they are made, and if there is any conflict between them, the statute prevails."[23] The Statutory Instruments Committee concluded that "the case law appears to indicate that such 'boot-strap' provisions do not turn an unauthorized regulation into an authorized one."[24] Allen is not so sure. He maintains that judicial decisions are inconsistent, and therefore that "it is still impossible . . . to state the law in this matter positively."[25] However, the issue is not particularly significant for this study inasmuch as most "as if enacted" clauses were repealed by the Regulations Act.

What is the attitude of the courts toward the subdelegation of regulation-making power, when authority to redelegate is not explicitly granted? Much has been written, and there has obviously been considerable disagreement. However, recent opinions are that the maxim, delegatus non potest delegare, is of declining importance. De Smith has stated that, except in an emergency, "it is doubtful whether implied authority to sub-delegate legislative powers would ever be conceded by the English courts."[26] He adds, however, that "a power vested in a Minister or a Department to make regulations can validly be exercised by an official authorized by his superiors to act in that behalf; this is not an example of sub-delegation, for the official is the Minister's other self, his alter ego."[27]

H. W. R. Wade suggested in 1961 that "it is taken for granted" that administrative powers delegated to a minister will be exercised by officials in his name, but that in the case of delegated legislative power, "it is presumed that he must make them as his own personal act."[28] By 1967, however, he believed that the exercise by officials "is probably as true of legislative as of administrative powers." In his opinion there was, nevertheless, a presumption against redelegation of power which has been delegated to someone other than a minister.[29] According to Reid, Canadian courts in the last thirty years "have not appeared to be particularly conscious" of a presumption against redelegation.[30] Abel supports this view: "so far as the operations of government have been concerned, it has been pretty well accepted that it [the presumption] does not apply."[31]

Reid reports that Canadian courts have given restrictive interpretations to enabling clauses, although cabinets have been "treated with deference."[32] This deference is, of course, significant inasmuch as most delegations in the Statutes of Canada are made to the cabinet.

C. Judicial Review of Delegated Administrative Power

While greater precision in the wording of enabling legislation should remove much controversy as to the legislative character of delegated authority, the courts will continue to make the final decisions when disputes arise. For this reason, it is necessary to consider briefly the implication for judicial review when delegated power is declared to be of an administrative nature.

Attempts to distinguish clearly among administrative, judicial, and quasi-judicial functions run into greater difficulty than those which try to separate legislative from administrative authority. One of the major efforts was made by the Committee on Ministers' Powers:

> A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requis-

> ites:--(1) the presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.
>
> A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice. . . . His ultimate decision is "quasi-judicial," and not judicial, because it is governed, not by a statutory direction to him to apply the law of the land to the facts and act accordingly, but by a statutory permission to use his discretion after he has ascertained the facts and to be guided by considerations of public policy. This option would not be open to him if he were exercising a purely judicial function.
>
> . . . .
>
> Decisions which are purely administrative stand on a wholly different footing from quasi-judicial as well as from judicial decisions and must be distinguished accordingly. . . . In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting are left entirely to his discretion.[33]

In spite of this apparent logic, however, most writers have concluded that a clear distinction has been proven unpractical.[34] De Smith describes an administrative function generally as one which "may involve making policy or carrying out a policy or simply deciding what is the most appropriate thing to do in particular circumstances." The decision is typically a discretionary one. He describes a judicial function as one which "involves the determination of a question of law or fact by reference to pre-existing rules or standards." He dismisses "quasi-judicial" as "a superfluous adjective which increases rather than diminishes confusion."[35]

Inconsistency by judges in their use of the terms "administrative" and "judicial" has significant legal consequences, inasmuch as the rules of natural justice (that no one can be judge in his own cause, and that no one can be deprived of his rights without a hearing) do not apply in the former instance.[36]

What is the scope of judicial review of delegated administrative power--that is, of the use of discretion? The role of the judge is "to confine the administrator within the bounds of legality, not to determine for himself the wisdom of challenged administrative action."[37] However, there is a thin line between the courts controlling excess of jurisdiction or abuse of power, and their influencing policy.

De Smith has alleged that "judicial review of statutory discretions is at once the most elusive and the most controversial aspect of English [and, presumably, Canadian] administrative law"--elusive because of the "almost infinite variety" of discretionary powers; controversial because of disagreement as to the propriety of courts as instruments for review.[38] Courts have frequently disclaimed their right to substitute their discretion for that of an authority named in a statute, but they have nevertheless asserted the right to determine what is lawful. The problem is especially significant when the limits of discretion are imprecisely stated in the enabling statute. De Smith describes two broad categories of principles which the courts have established to govern the exercise of discretion. These are, first, the failure to exercise a discretion, and second, the excess or abuse of discretionary power.[39] Discretion may not have been exercised, he says, if powers have been subdelegated, if an action has been taken under the dictation of someone else who is not empowered to give instructions, or if the authority has adopted a rule not to exercise the discretion.

In the second category, de Smith includes the criteria of purpose, grounds, and reasonableness.[40] Basic to these criteria is the presumption that Parliament has intended delegated powers, however broadly defined, to have limits not determinable by the authority which exercises the discretion. Nevertheless, the possibility of making mistakes is part of discretionary power. The role of the courts is thus to "draw the line between mistakes made intra vires and mistakes made ultra vires."[41] If, therefore, powers are delegated for a particular purpose, exercise for any other purpose is illegal. Even if a statute empowers a minister to act "if he is satisfied," the courts have indicated that they would quash an action which was not performed in good faith.[42] De Smith suggests, however, that bad faith ("the intentional misuse of power for extraneous motives") may be "virtually impossible" to establish in relation to actions of ministers, although the "misuse of powers in good faith--by using them for an unauthorized purpose or without regard to legally relevant considerations or on the basis of legally irrelevant considerations--need not be so difficult to prove." He adds that actions of the Crown-in-Council may be reviewed only on the basis of misuse of powers in good faith.[43] The validity of administrative action is not, generally, conditional upon its reasonableness. However, because of the difficulty separating irrelevance and unreasonableness, an unreasonable act can often be challenged on the basis of irrelevancy. When an authority has acted unreasonably, but has avoided irrelevance, "the courts must define the limits of their power to examine the reasonableness of administrative action."[44] In the words of Lord Greene:

> It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere . . . ; but to prove a case of that kind would require something overwhelming.[45]

Hogg, in his review of administrative law cases heard by the Supreme Court of Canada between 1949 and 1971, has concluded that

> the result of a case involving an attack on a discretionary decision is highly unpredictable. It will often depend upon the cast of mind with which the judge approached his task.
>
> . . . .
>
> On the whole, the Supreme Court of Canada has chosen the wise path of deference to the agency's perception of its role. Only a small minority of the decisions which were attacked as an abuse of discretion were actually quashed, and those that were quashed often attracted dissenting support from some members of the court.[46]

In Chapter II, reference was made to the fact that several statutes contained privative clauses, purporting to exclude judicial review of delegated action. These are mainly the "final and conclusive" and "no certiorari" clauses. At first glance one might agree with E. C. S. Wade and Bradley, and with Corry and Hodgetts, that Parliament may with little difficulty exclude judicial review. For example:

> The power of the courts to control the administration is subject to what Parliament has laid down; and Parliament may exclude the courts either expressly, or indirectly by conferring discretions of such a kind that there is virtually no possibility of challenge. Even the most revered principles of statutory interpretation are subject to the express words of the legislature.[47]

Also:

> In Britain and Canada, where the separation of powers is not written into the constitution, Parliament is free to make any administrative adjudication final and conclusive if it wishes.
>
> . . . .
>
> In Britain and Canada, the power of the courts to review the procedure followed by an administrative agency rests mainly on the common law and so can be modified or removed by an act of the legislature.[48]

Support for the legitimacy of privative clauses is based on the principle of the supremacy of parliament. Thus, says Dussault,

> the power of the Legislature to immunize administrative bodies which are within its legislative competence against possible intervention by the courts is a fundamental attribute of its sovereignty.[49]

However, the fate of privative clauses in the hands of Canadian courts belies the impression which these statements create. De Smith, for example, notes that

> in Canada, where apparently unambiguous privative clauses have often been embodied in legislation setting up administrative boards, restrictive interpretation has been carried so far that they have been rendered almost meaningless.[50]

H. Sutherland, after reviewing the treatment given five kinds of privative clauses, concludes that no type of clause can be devised to exclude judicial review beyond any question because such clauses are inoperable if the authority were deemed to be acting without jurisdiction. At one point he comments that "a court may always say that the 'decision' of the 'board' is not a 'decision' since it was made without jurisdiction--and that the 'board' is not a 'board' because it acted without jurisdiction."[51] Bora Laskin has lamented the fact that "no form of words designed to oust judicial review will succeed in doing so against the contrary wishes of a superior court judge."

Privative clauses "have, in truth, been read out of the statutes."[52] B. L. Strayer comments, simply: "The refusal of the courts to give effect to privative clauses is notorious."[53]

Apparently, however, this situation is changing. Hogg noted in 1973 that "there have been intermittent indications that the Supreme Court of Canada . . . is moving away from the old simplistic view which in effect robbed privative clauses of any efficacy at all."[54]

E. Conclusion

As this Chapter has shown, the scope of judicial review depends upon the type of power which has been delegated. Although the present study is concerned with legislative authority, we have seen that this authority merges with administrative delegations. This means that the decision which a court makes in any given case will be based on the court's interpretation of the type of delegated power.

For instruments which are clearly legislative, the judiciary's role is to determine, largely untrammeled by considerations such as reasonableness and natural justice, whether or not they are authorized by the enabling statutes. It follows, therefore, that the more precise Parliament is in the writing of enabling clauses, the more predictable the court rulings will be. Indeed, greater precision might reduce the number of disputes. Even a generally restrictive interpretation of enabling legislation must be consistent with the wording of the delegation. For instruments which are near the borderline between legislative and administrative authority, Parliament could by more frequent use of the term "regulation" indicate those which it regards as legislative in nature.

What is the role of the judiciary in controlling subordinate legislation? Delegated authority must be used "legally," but because the legality of regulations does not normally depend upon their being "reasonable," for example, the courts are limited in their ability to prevent the abuse of delegated power. However, even if tests of reasonableness were applied to regulations, one might argue that this is an area more appropriate for Parliament than for the courts. For these reasons, the importance of Parliament as the proper body to scrutinize regulations can more clearly be understood.

Chapter III pointed out the inadequacy of parliamentary techniques to control subordinate legislation. Chapter IV and the present Chapter have demonstrated that, while the executive and judiciary are important agents in the total control machinery, they are not appropriate to make up Parliament's deficiency in preventing the abuse of delegated power. Reform within Parliament itself was needed. The following Chapter discusses the first major step taken in that direction.

Footnotes

[1] S. A. de Smith, Judicial Review of Administrative Action (London: Stevens & Sons Limited, 1963), p. 80. (The inner quotation is from John Willis, "Administrative Law and the British North America Act," Harvard Law Review, LIII [1939], 281.) Essentially the same thing is said by J. A. C. Griffith and H. Street, Principles of Administrative Law (London: Sir Isaac Pitman & Sons, Ltd., 1967), p. 147; and by René Dussault, "Relationship between the Nature of the Acts of the Administration and Judicial Review: Quebec and Canada," Canadian Public Administration, X [1967], 307. De Smith adds, however, that "there are always cases in which courts will feel bound by precedent to adopt a particular mode of classification against their own inclination." (P. 80.)

[2] Although authors differ somewhat in their terminology, these are the functions most frequently identified.

[3] Statutory Instruments Committee, Third Report, p. 15.

[4] One exception is P. W. Hogg's review of one hundred administrative law cases which, with certain exceptions explained by the author, were all of the cases which came before the Supreme Court of Canada between 1949 and 1971. Thirty-two of the one hundred related to Government of Canada statutes. These figures are not especially relevant to the present study, however, because they shed no light on the number of cases which ended in the lower courts, and because they include disputes relating to administrative and judicial functions. (P. W. Hogg, "The Supreme Court of Canada and Administrative Law, 1949-1971," Osgoode Hall Law Journal, XI [1973], 191-193.)

[5] Griffith and Street, Principles, p. 49. They also noted (p. 32) that the courts have held "administrative instructions" to be legislative in nature.

[6] "Report of Committee on Ministers' Powers," p. 19.

[7] Robert F. Reid, Administrative Law and Practice (Toronto: Butterworths, 1971), p. 258.

[8] H. W. R. Wade, Administrative Law, 1967, pp. 291-292.

[9] S. A. de Smith, Constitutional and Administrative Law (Middlesex: Penguin Books, 1971), p. 513.

[10] J. A. Corry, "Statutory Powers," in Legal Essays in Honour of Arthur Moxon, ed. by J. A. Corry, F. C. Cronkite, and E. F. Whitmore (Toronto: University of Toronto Press, 1953), p. 134.

[11] Parliament may not abdicate its legislative power, delegate legislative authority to a provincial legislature, or violate the British North America Act's distribution of powers.

[12] Griffith and Street, Principles, p. 105; Driedger, "Subordinate Legislation," p. 9.

[13] Driedger, "Subordinate Legislation," pp. 9-13.

[14] Ibid., p. 13.

[15] Griffith and Street, Principles, pp. 111-115. Driedger comes to essentially the same conclusion. (Ibid., pp. 14-21.)

[16] Griffith and Street, Principles, p. 115.

[17] See David D. Mundell, "Judicial Protection of the Individual against the Executive in Canada," in Judicial Protection Against the Executive, ed. by Hermann Mosler (Berlin: Carl Heymanns, 1969), pp. 587-588.

[18] De Smith, Judicial Review, 1968, pp. 337-338, and 338 (n. 92).

[19] Driedger, "Subordinate Legislation," p. 27. He cites as examples, the presumption against taking property without giving a legal right to compensation, and giving regulations retroactive effect. (P. 26.)

[20] Reid, Administrative Law, p. 267.

[21] Ibid., p. 263.

[22] Griffith and Street, Principles, pp. 118-119; de Smith, Judicial Review, 1968, p. 484.

[23] Driedger, "Subordinate Legislation," p. 6.

[24] Statutory Instruments Committee, Third Report, p. 34. The Committee quoted H. W. R. Wade, and Griffith and Street, in support of its conclusion.

[25] C. K. Allen, Law and Orders (London: Stevens & Sons Limited, 1965), p. 262. De Smith agrees. (Constitutional and Administrative Law, p. 352.)

[26] De Smith, Judicial Review, 1968, p. 283.

[27] De Smith, Constitutional and Administrative Law, p. 352.

[28] H. W. R. Wade, Administrative Law, 1961, p. 262.

[29] *Ibid.*, 1967, p. 304.

[30] Reid, *Administrative Law*, p. 271 (n. 104).

[31] Statutory Instruments Committee, *Minutes*, May 1, 1969, p. 74.

[32] Reid, *Administrative Law*, pp. 260-261, 265. He does not, however, give any indication of the frequency of cases.

[33] "Report of Committee on Ministers' Powers," pp. 73-74, 81.

[34] See, for example, de Smith (above p. 1); William A. Robson, *Justice and Administrative Law: A Study of the British Constitution* (London: Stevens & Sons Limited, 1951), p. 467; H. W. R. Wade, "'Quasi-Judicial' and its Background," *Cambridge Law Journal*, X (1950), 217; and Andre Gelinas, "Judicial Control of Administrative Action: Great Britain and Canada," *Public Law*, 1963, 141.

[35] De Smith, *Constitutional and Administrative Law*, p. 513. His description of an administrative action as one which might involve "making policy" would seem to invite confusion with a delegated legislative action.

[36] See, for example, Griffith and Street, *Principles*, p. 156; Dussault, "Relationship," p. 305.

[37] B. Schwartz, *An Introduction to American Administrative Law* (London: Pitman, 1958), p. 180, quoted in H. J. Lawford, "Appeals against Administrative Decisions: The Function of Judicial Review," in *Public Administration in Canada: Selected Readings*, ed. by A. M. Willms and W. D. K. Kernaghan (Toronto: Methuen, 1968), p. 424.

[38] De Smith, *Judicial Review*, 1959, p. 166.

[39] *Ibid.*, 1968, pp. 281-339.

[40] See also Griffith and Street, *Principles*, pp. 225-230; and H. W. R. Wade, *Administrative Law*, 1967, pp. 63-80.

[41] H. W. R. Wade, *Administrative Law*, 1967, p. 64.

[42] Griffith and Street, *Principles*, p. 226.

[43] De Smith, *Judicial Review*, 1968, p. 316; and de Smith *Constitutional and Administrative Law*, p. 571.

[44] De Smith, *Judicial Review*, 1968, pp. 330-331.

[45] Quoted *ibid.*, p. 336.

[46] Hogg, "The Supreme Court of Canada," p. 207.

[47] E. C. S. Wade and A. W. Bradley, Constitutional Law (London: Longmans, 1965), p. 638.

[48] Corry and Hodgetts, Democratic Government, pp. 534-535.

[49] René Dussault, "Legislative Limitations on the Courts' Power to Review Administrative Action in Quebec," McGill Law Journal, XIII (1967), 41. The author notes that, in spite of the title, much of the article is relevant to Canadian common law jurisdictions.

[50] De Smith, Judicial Review, 1968, p. 347.

[51] H. Sutherland, "Administrative Law--Privative Clauses and the Courts--A Review," Canadian Bar Review, XXX (1952), 75-76. The five types of private clauses are (1) "decision shall be final," (2) "no certiorari," (3) "as if enacted," (4) "conclusive evidence," and (5) combinations and extensions of these four. Although this article was written when Sutherland was a third-year law student, it was prepared under the supervision of Professor John Willis (then of the University of Toronto Law School). Also, Bora Laskin commented on its excellence. (Bora Laskin, "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses," Canadian Bar Review, XXX (1952), 988, n. 9.)

[52] Laskin, "Certiorari to Labour Boards," pp. 990-992.

[53] B. L. Strayer, Judicial Review of Legislation in Canada (Toronto: University of Toronto Press, 1968), p. 49.

[54] Hogg, "The Supreme Court of Canada," p. 198.

CHAPTER VI

THE HOUSE OF COMMONS SPECIAL COMMITTEE ON STATUTORY INSTRUMENTS

A study of the debates of control measures in the statutes-in-force in 1967-68 suggests that, with few exceptions, members of Parliament demonstrated little interest in parliamentary control of subordinate legislation.[1] It must be emphasized, however, that debates of control measures indicate only one facet of parliamentary concern, and that caution must be exercised in drawing conclusions from it.

In the first place, the study excluded debates of the many Acts which contained no control provisions. Second, debates of enabling clauses (which were not considered) may in some cases have been better measures of concern than those of the provisions for control themselves. Indeed, Professor Kersell has reported that between 1945 and 1957, few enabling clauses "escaped unruffled by Parliamentary prying into their implications."[2] Third, some Acts which were replacements of earlier statutes, and which duplicated control measures of the repealed statutes, may have sparked less discussion than when the control provisions were originally enacted. Debates of these earlier Acts were generally excluded from the study. Fourth, the inclusion of control clauses before bills were introduced into Parliament might have defused criticism which otherwise would have been expressed.[3] Fifth, unsuccessful attempts to insert provisions for scrutinizing subordinate legislation have generally not been uncovered.

For these reasons, therefore, a conclusion that the matter of parliamentary control has been non-controversial may not be entirely justified. However, in view of the marked absence of demands for the broadening of existing modest control measures, and in view of the brevity and nature of the Regulations Bill debate which presented an excellent opportunity for members of Parliament to air their grievances, there is little to suggest that members of either house have in the past been greatly concerned about scrutinizing the exercise of delegated authority.

Nevertheless, on September 24, 1968, the Honourable Donald Macdonald, President of the Privy Council, moved in the House of Commons:

> That a Special Committee of twelve Members, to be named at a later date, be appointed to consider and, from time to time, to report on procedures for the review by this House of instruments made in virtue of any statute of the Parliament of Canada.[4]

This action had been predicted by the Prime Minister and Mr. Macdonald, and supported by Mr. Baldwin, during debate on the Speech from the Throne.[5]

> Macdonald hoped that the Special Committee would want to ask
>
> whether we are passing bills which authorize the minister or the council to exercise a legislative authority fully as wide as that of Parliament itself [,] . . . whether the Canadian practice of having statutory instruments made chiefly by order in council rather than by ministerial regulation gives adequate ground for thinking that our instruments are less dangerous than those made, for example, in the United Kingdom [,] . . . whether this house ought to employ an officer to review statutory instruments in some such way as the Auditor General reviews expenditures made pursuant to parliamentary appropriation [, and] . . . whether this house should set up a standing committee to scrutinize the orders and whether we should es-

> tablish procedures by which both individual members and the committee could seek to have orders altered or revoked.[6]

The two opposition parties which participated in the debate enthusiastically endorsed the motion. "An historic start," Mr. McIntosh (Cons.) called it. Mr. Brewin (N. D. P.) acknowledged that there were other possible methods of controlling the exercise of delegated authority--by courts, the executive, and ombudsmen--but he suggested that

> it is this house of elected members which is and should be primarily both the maker of laws affecting the people of this country and the protector of the people of this country against encroachment by the executive and its servants.[7]

The Committee's membership consisting of seven Liberals, three Conservatives, one New Democrat, and one Creditiste, was approved by the House on November 8.[8]

Under the chairmanship of Mr. MacGuigan, the Committee met twenty-two times between November 13, 1968, and October 7, 1969; it questioned eight "expert" witnesses, and representatives of four departments.[9] The final eight meetings were held in camera to discuss the draft of the third report.[10] Mr. Gilles Pépin, Dean of the University of Ottawa's Faculty of Civil Law, was Counsel to the Committee; Mr. John W. Morden, a Toronto barrister who had been a counsel to the Ontario McRuer Royal Commission Inquiry into Civil Rights, was Assistant Counsel.

The following table is an attempt to show the participation of Committee members insofar as it is revealed by attendance and participation in public discussion. The printed Evidence of the Committee occupies 460 columns, eighty-six of which are devoted to initial presentations of witnesses. The number of columns in which each member is shown by Table 9 to have taken part in discussion is therefore based upon a total possible of 374.[11]

TABLE 9

PARTICIPATION BY COMMITTEE MEMBERS

Member	Party	Number of Meetings		Remarks (No. of Columns)
		Of 22	Of Final 8	
Forest	Lib.	15	8	14
Gibson	Lib.	16	6	19
Hogarth	Lib.	4	. .	13
Marceau (vice-chair.)	Lib.	17	7	4
MacGuigan (chairman)	Lib.	22	8	177
Murphy/Roy	Lib.	9	4	13
Stafford	Lib.	11	. .	19
Baldwin	Cons.	15	8	28
McIntosh/McCleave	Cons.	18	6	76
Muir	Cons.	10	5	27
Brewin	N. D. P.	13	8	24
Tétrault	R. Cred.	1[a]	. .	. .

[a] The organization meeting.

The quorum of seven members was achieved fourteen times, half of them for the *in camera* meetings.

Apart from MacGuigan who was easily the most active member, the Table shows no significant pattern of attendance in comparing Liberal and Conservative members although, as one might expect, the Conservatives were consistently more vocal than the Liberals. Mr. Tétrault contributed nothing. It must be realized that no contributions made during *in camera* discussion are revealed by the Table.

The Committee collected a large volume of information. Some of it already existed in published or unpublished form, but much was prepared expressly for the Committee.[12] The latter category included "A Preliminary Survey of the Canadian Statutes" (Exhibits O, P, JJ, KK, LL) prepared by Mdme. Immarigeon of the Parliamentary Library's Research Branch, "A Report on Some of the Writings in the Field of Delegated Legislation" (Exhibit PP) compiled by Dean Pépin, a "Survey of Canadian Law and Practice Respecting Subordinate Legislation" (Exhibit RR) prepared by Mr. Morden, and the responses (Exhibit QQ) to the questionnaire distributed to some 120 government departments and other agencies.

By the time the Committee had concluded its public hearings it was clear that an expansion of its terms of reference was desirable. Therefore, partly at the suggestion of Justice Minister Turner, the House on July 10, 1969, authorized the Committee:

> To consider and, from time to time, to report on the adequacy of existing statutory authority for the making and publication of Statutory Instruments and on the adequacy of existing procedures for the drafting, scrutiny, and operational review of such instruments, and to make recommendations with respect thereto.[13]

In fact, the Committee had already gathered much information in this expanded area, so that the broadening of the terms of reference may have done little more than permit an expansion of the Committee's recommendations.

An underlying assumption of the Committee was "that public knowledge of governmental activities is the basis of all control of delegated legislation," that this knowledge must be available "before, during, and after the making of regulations, and that any derogation by government from this rule requires justification." Because regulations have the force of law, "they should be made by processes which as far as possible approximate the openness of the general legislative process."[14]

A. The Meaning of "Regulation"

A recurring theme throughout the Committee's deliberations was the problem of identifying those instruments which should be subject to the controls provided for by the Regulations Act and the Bill of Rights. All regulations "caught" by the Regulations Act were subject to executive control as described in Chapter IV. In addition, the Act required that these regulations be published in English and French in the Canada Gazette within thirty days of their making (s. 6), and tabled in Parliament within fifteen days of their being published or, if Parliament were not then in session, within the first fifteen days of the next session (s. 7).

Of the four categories of regulation not covered by the Regulations Act[15] the one which most concerned the Committee, or at least its chairman, consisted of documents which regulation-making authorities did not consider to be of a legislative nature. MacGuigan asked Department of Transport officials if some of their directives may not in fact be "regulation by the back door."

> Are these directives to departmental officials in effect determinative of the rights of the public in that they determine the interpretation which will be given to them by the Department. So that an ambiguous regulation, one which is capable of several possible interpretations may, in effect, be further specified by one of these directives and therefore the rights of the public are indirectly affected even though directly it would appear that there is no effect on the public.[16]

There was a more prolonged discussion, however, of Manpower and

Immigration Department directives relating to the exercise by immigration officers of the discretion given them under Sections 32(4) and 33(5) of the immigration regulations.[17] At this time, also, MacGuigan was the only Committee member to participate. According to R. E. Williams, Legal Adviser to the Department, these were "directives in the application of policy. They would be administrative in nature."[18] MacGuigan responded:

> I suppose that is the question we have to raise with you, are these legislative in character or not. If they, in effect, determine what happens to the public and therefore who comes into Canada or who does not, are they not just as much of a legislative character as any provisions in the regulations or in the Act?[19]

J. C. Morrison (Director General of Operations) suggested that the directives were merely "advice" or "guidance" to achieve "consistency in departmental policy." He readily admitted, however, that the issue

> gets right to the root of the problem that is bothering the Committee, as to whether not only our Department but other departments of government, through the issue of what we as public servants have always viewed as essentially administrative documents, are for practical purposes issuing documents, which take our actions in a legal sense beyond what has been spelled out either in an Act of Parliament or in a set of regulations passed by Order in Council.[20]

To this, the chairman replied that "in the absence of the directives our question might be whether or not there is too great discretion given to border officials." He thought that immigration officers would surely assume that they were to follow the "guidance."[21] It is this effect on the manner of exercising an officer's authority which was the "crucial consideration," the Committee later reported.[22]

Notwithstanding problems caused by the use of different words such as "regulation," "order," "rule," "proclamation," within the

Regulations Act definition of "regulation," and the use of the same words to include both legislative and other action,[23] the Statutory Instruments Committee concluded that "the main difficulty in practice is to distinguish between a legislative act (regulation) and an administrative act."[24] Unfortunately, therefore, "important legal consequences flow from a characterization that is sometimes very difficult to make."[25]

The Committee proposed a two-fold solution:[26] first, that the definition of "regulation" include directives; and second, that the Regulations Act include a procedure for determining whether a doubtful document was of a legislative nature.[27] The Committee recognized that such a procedure would not catch a document about which the authority making it had no doubt, but this "obvious frailty" would be reduced by implementation of the additional recommendation

> that all departmental directives and guidelines as to the exercise of discretion under a statute or regulation where the public is directly affected by such discretion should be published and also subjected to parliamentary scrutiny.[28]

The suggested definition of "regulation" also included use of the Royal prerogative in the exercise of a legislative power, and any document made in the exercise of such a power which has been subdelegated.[29]

B. Enabling Legislation

Sir Cecil Carr once said that "in general, if delegation of legislative power is mischievious [sic], the mischief must primarily have been done when the Bill was passed which conferred the power."[30]

Although no witness or Committee member questioned the need for delegated authority, there were frequent calls for greater precision in the wording of enabling legislation. The value of precision was seen as a means both to clarify the nature of power which was being delegated and, apparently, to keep delegated authority to a minimum.

Professor Arthurs, on the other hand, argued that

> there ought to be the broadest possible mandate for regulation-making, as we normally call it, and that Parliament ought to confine itself so far as possible to the announcement of broad policy lines within which that regulation-making shall operate and to scrutiny of the regulations once made.[31]

No criticism of this position was expressed; indeed, Baldwin "thoroughly agree[d]" with it.[32]

In reply to questioning by Mr. Morden, Arthurs stated that the seemingly broad power to make regulations to carry out an Act's provisions and purposes has in fact been narrowly interpreted by the courts.[33] Nevertheless, the legal adviser to the Department of Manpower and Immigration later suggested that the delegation of such power by Section 61 of the Immigration Act was the authorization for Section 32(4) of the immigration regulations, which gives border officials the authority to exercise discretion in granting or refusing admission to Canada.[34] The Committee's concern was that this kind of delegation not be expressed in subjective terms. It urged that need be established before the power is included in any bill, and that "the precise limits of the law-making power which Parliament intends to confer . . . be defined in clear language."[35]

When MacGuigan asked "what justification there could ever possibly be for a subjective grant of power, as he [the Governor-in-

Council] deems fit or as he deems necessary," Justice Minister Turner replied that "it is a matter of policy. The government has to be responsible for policy and not have that judgement substituted by a court." Associate Deputy Minister D. S. Thorson added that the breadth of power is controlled by narrowing the objective: when the grant follows an enumeration of specific powers it is a narrow grant, he said, but

> if there were simply a statement that the Governor in Council may make such regulations as he deems necessary to carry out the purposes and provisions of this act, period, full stop, then you get a rather different legal result. Then your scope of regulation-making power is circumscribed by the terms of the statutes.[36]

Nevertheless, the Government indicated in its reply to the Committee's questionnaire that "the 'deems necessary' formula could be eliminated in all but a few exceptional cases."[37] The Committee agreed that subjective delegation was undesirable.[38]

Professor Kersell expressed the greatest concern about the breadth and imprecision of enabling clauses in Canadian statutes. He was particularly critical of the use of the permissive "may," authority to subdelegate legislative power, and authority to carry out an Act's provisions.[39] In reply to Mr. Gibson's inquiry as to how backbenchers could insist upon greater precision, he suggested that enabling clauses be referred to a scrutiny committee before they become law.[40] The Committee thought that referral should be at the discretion of the Minister of Justice to avoid rigidity, although "the repeated reluctance of the Minister of Justice to refer such provisions to the Committee might become subject matter for debate on bills in the House."[41]

In response to Turner's suggestion that the Committee recommend guidelines for the drafting of enabling legislation, the Committee urged that "all enabling acts for regulation-making authorities should accord with the following principles:[42]

(a) The precise limits of the law-making power which Parliament intends to confer should be defined in clear language.
(b) There should be no power to make regulations having a retrospective effect.
(c) Statutes should not exempt regulations from judicial review.
(d) Regulations made by independent bodies, which do not require governmental approval before they become effective, should be subject to disallowance by the Governor in Council or a Minister.
(e) Only the Governor in Council should be given authority to make regulations having substantial policy implications.
(f) There should be no authority to amend statutes by regulation.
(g) There should be no authority to impose by regulation anything in the nature of a tax (as distinct from the fixing of the amount of a license fee or the like). Where the power to charge fees to be fixed by regulations is conferred, the purpose for which the fees are to be charged should be clearly expressed.
(h) The penalty for breach of a prohibitory regulation should be fixed, or at least limited by the statute authorizing the regulation.
(i) The authority to make regulations should not be granted in subjective terms.
(j) Judicial or administrative tribunals with powers of decision on policy grounds should not be established by regulations.

The importance of several of these guidelines appears to be self-evident. The substance of most of them was either discussed during the Committee's public deliberations or was urged in material gathered for the Committee.

Four of the guidelines ([b], [c], [f], [g]) corresponded to those which the Government recommended.[43] Three others proposed by the Government were omitted by the Committee. First, the prohibition of power to make regulations "which might trespass unduly on personal rights and liberties" would, in the Committee's view, be unnecessary if the Committee's guidelines were adopted.[44] Second, the Committee thought that the prohibition of regulations "involving matters of policy or principle" might interfere with "the main operations of the Administration."[45] It chose, instead, to recommend that such regulations be made only by the cabinet. The Committee did not comment upon the third omission--the prohibition of power to subdelegate regulation-making authority. It is surprising that the Government did not oppose the making of subjective delegations, in view of its admission that few such delegations were necessary.

C. Advance Consultation

Apart from Professor Abel's testimony already noted,[46] the matter of advance consultation with groups or individuals affected by regulations received scant attention from witnesses or Committee members. The main exception was the interest of MacGuigan, and to a lesser extent McCleave and Muir, during the testimony of officials from the Department of Transport.[47]

The responses to question eleven of the Committee's questionnaire have been noted.[48] Question twelve asked if "parliamentary committees [are] ever consulted in the formulation of your regulations." Only the Department of Finance and the Treasury Board replied in the affirmative,[49] although several other agencies stated that they consider comments made in committees.[50]

The Statutory Instruments Committee took the view that "no useful purpose" would be served by a general statutory requirement of advance consultation. However, because there were "obvious advantages" of such consultation, regulation-making authorities should

> engage in the widest feasible consultation, not only with the most directly affected persons, but also with the public at large where this would be relevant. Where a large body of new regulations is contemplated, the Government should consider submitting a White Paper . . . , stating its views as to the substance of the regulations, to the appropriate Standing Committee, which might conduct hearings with respect thereto.[51]

This recommendation was not intended to deny the value of inserting in statutes, when appropriate, the requirement of some form of consultation.[52]

D. Drafting and Examining Regulations

One cannot disagree with the statement of the Statutory Instruments Committee that "it is difficult to over-estimate the importance of good drafting in the regulation-making process. It is important that regulations be drawn with the same care and attention as statutes."[53] Arthurs cautioned, however, that

> the pure science of regulation drafting, so prized in certain circles on the Hill here, in my view ought to give way to intelligibility. There is no more important principle than intelligibility when you are dealing particularly with laymen.[54]

Chapter IV considered in some detail the requirements contained in the Regulations Act, Bill of Rights, and regulations made under these statutes, as well as the actual nature of this executive control. The Statutory Instruments Committee was concerned that the Legal Adviser to the Privy Council Office bore "far too heavy a burden," and it recommended that individual departments and other agencies share the load by improving the drafting quality. The Justice Department should, the Committee thought, expand its Legislative Section and provide "thorough training" for drafting officials.[55]

The Committee also urged that regulations made under existing statutes satisfy its recommended guidelines for enabling legislation, as well as the suggested terms of reference for the proposed scrutiny committee. Examination of regulations by the Privy Council Office and Department of Justice should continue.[56]

E. Publication of Regulations

The principle of publishing regulations was not, of course, questioned during the Committee's study. The Committee noted that "if the general purpose of law is to make human actions conform to certain standards then there must be adequate publicity given to laws of all kinds before compliance therewith can be reasonably expected."[57] However, it did not consider whether publication in the Canada Gazette provided adequate publicity. Arthurs suggested that personal notification could replace publication in the case of regulations which affect only an individual or a small group;[58] and Kersell commented that "if compliance is the purpose of law, then publication is perhaps not as good as publicity."[59]

It was the Committee's opinion that "all regulations, irrespective of the regulation-making authority, should be available for public inspection."[60] J. L. Cross told the Committee that there were no secret orders-in-council, or regulations approved by the Governor-in-Council, by virtue of their having been exempted from the provisions of the Regulations Act.[61] However, regulations which did not emanate from the Governor-in-Council, or which were not approved by him, were not necessarily public information if they had been exempted under Section 9 of the Regulations Act or if in the opinion of the agency making them they were not "regulations" as defined by that Act.

In reply on behalf of all regulation-making authorities to questions sixteen and eighteen of the Committee's questionnaire, the Government suggested seven circumstances which in its view would justify either delay in or exemption from publication.[62] There can be little question of six of these. However, one may ask why regulations (under item [e]) which "are of limited application and involve the granting of privileges or the relaxation of rules," should be exempted unless their communication to affected people is assured. The Committee accepted the validity of all seven circumstances but it believed that exemption from publication should not include exemption from the other requirements of the Regulations Act, especially examination and tabling, except in the interest of national security.[63]

Although regulations caught by the Regulations Act had to be published in the Canada Gazette within thirty days of their making, and failure to publish did not invalidate them, the Act was silent as to when regulations became effective.[64] The controlling statute was, therefore, the Interpretation Act which provided that regulations were effective when made.[65] The Committee noted that,

> with the exception of regulations made in the form of orders in council, which require the signature of the Governor General, there is, generally, little, if any, formality associated with the making and coming into force of a regulation. Regulations become operative law upon their execution by the regulation-making authority and without any further procedure.

> This lack of formality ill accords with the degree of openness which we believe should be associated with law-making, particularly having regard to the possibility that there may have been no antecedent publicity respecting the making of the regulation.

It therefore recommended that regulations be transmitted to the Clerk of the Privy Council before they come into force.[66]

Question three of the Committee's questionnaire asked what the effect would be of a statutory requirement which prevented regulations from becoming effective until (a) published in the *Canada Gazette* or, (b), thirty days after such publication. It is not surprising that some of the agencies which make few regulations anticipated little difficulty.[67] Beyond this, however, the answers "indicate conclusively that the effect of such requirements depends entirely on the nature of the regulation in question."[68] The Committee concluded, therefore, that publication should not be a general prerequisite to regulations' coming into force. However, statutes or regulations themselves should, whenever practical, provide that the effectiveness of regulations would follow publication. The Committee recommended, furthermore, that departments should give the proposed scrutiny committee "valid reasons" why particular regulations should come into force before publication.[69]

According to the Government, the thirty-day publication limit following the making of regulations could be reduced only if the Queen's Printer reduced its required twelve-day advance notice or if the *Canada Gazette* were published more frequently.[70]

F. Tabling Regulations

The only discussion of tabling during the Committee's hearings appears to have been a short exchange about the mechanics of the operation.[71] The inadequacy of tabling as a means of informing members of Parliament was acknowledged. Not only do references in Votes and Proceedings say nothing about the nature of tabled documents but also, according to McCleave, "that is the part of Votes and Proceedings that nobody reads."

In pursuing this point in its Third Report,[72] the Committee noted that copies of Part II of the Canada Gazette were not automatically distributed to all members of Parliament as evidently required by Section 3(2) of the regulations made under the Regulations Act and Section 10(3) of the Publications of Statutes Act. In concluded that "the present laying procedure provided for in Section 7 of the Regulations Act is an empty formality." Regulations should, the Committee suggested, be tabled immediately following their transmittal to the Clerk of the Privy Council; and Votes and Proceedings should list descriptive titles of all tabled regulations.

G. Scrutinizing Regulations

Inasmuch as the original task of the Statutory Instruments Committee was "to consider and . . . to report on procedures for the review by this House of instruments made in virtue of any statute of the Parliament of Canada," it is not surprising that the "expert" witnesses devoted much of their attention to the question of a scrutiny committee. The Statutory Instruments Committee developed an elaborate set of recommendations to govern the operation of such a committee.

1. Location of a Scrutiny Committee

It may be argued that the terms of reference of the Statutory Instruments Committee precluded any recommendation other than the House of Commons as the location of a scrutiny committee. Nevertheless, witnesses expressed their opinions, and the Committee's recommendation was not, apparently, unanimous.

Kersell considered the question in some detail.[73] His ideal was a Commons committee of ten or twelve members, with an opposition majority and a senior member of the ruling party as chairman. The majority would strengthen the appearance of freedom from Government control; the chairman would have easier access to regulation-making authorities, and this would facilitate changes in regulations to which the committee might object. Because the committee's operation would, he hoped, be nonpartisan "the chairman himself would lose any tendency to be partisan." Kersell also thought that the committee should consider enabling clauses themselves, and the "merits" of regulations. It appears that scrutiny committees in other jurisdictions have been able to function in a nonpartisan way. One might wonder, however, whether a Canadian committee, especially one which considered the merits of subordinate legislation, could do so. Kersell admitted that his total package would probably be unacceptable to most Canadian governments. His second choice, therefore, was a Senate scrutiny committee which would not only have more time, but also would more easily be nonpartisan in its deliberation on policy matters.

Professor Brown-John recommended a joint committee of fifteen members with a Senator as chairman because "senators are in a position to maintain a continuing review of subordinate legislation."[74]

Brewin seems to have been the only member of the Statutory Instruments Committee to state an opinion. He "would tend to take issue" with a proposal for Senate scrutiny.[75]

The Committee as a whole sidestepped the question of location by taking refuge in its terms of reference. Its Third Report did, nevertheless, note that some members favoured a joint committee, although others "felt that the non-elective and non-representative character of the Senate made it unsuitable for this role."[76] The Government itself had recommended a joint committee.[77]

2. Scrutiny by a Separate Committee or by Subject-Matter Standing Committees

The Statutory Instruments Committee's first witness, Professor Arthurs, proposed that subject matter committees were appropriate to perform the scrutiny function. These committees, he believed, can best determine "whether or not the regulation changes or initiates the policy in this particular field of activity."[78] He stressed the need for expert staff, familiar with the subject matter, to assist each committee to make the work manageable. In addition, he thought that committee time devoted to the review of regulations would be minimal inasmuch as members would be expected to remain familiar with developments, including regulations, in their area.[79]

Brewin was impressed with Arthur's proposal[80] and he later suggested that immigration regulations "should be regularly and consistently reviewed by . . . a standing committee on immigration" because they contain much of Canada's immigration policy.[81] Although this suggestion is not the same thing as a proposal for scrutiny of regulations in general by subject-matter standing committees, he did make the broader suggestion in conversation with Kersell.[82]

Apart from Arthurs, three of the other four witnesses who commented upon this issue favoured a single scrutiny committee and the exclusion of the merits of regulations from its deliberations.[83] Kersell could envisage a scrutiny committee performing the technical or procedural review, and subject-matter committees pursuing questions of a policy nature. Professor Mallory, on the other hand, recommended a single committee to consider both procedural and policy questions. This structure would not, he believed, preclude other committees discussing regulations in their respective areas. If the scrutiny of policy led to majority rather than unanimous reports to the House, he said, members of the minority could as individuals or through their parties raise issues at the ten o'clock adjournment.[84]

After giving "serious consideration" to the possibility of scrutiny by existing committees the Statutory Instruments Committee concluded "that the continuous and sustained examination of regulations necessitates the establishment of a new Standing Committee on Regulations."[85]

The essential characteristics of any scrutiny committee are nonpartisanship in its operation and easy access to the seats of power in departments and other agencies. The Statutory Instruments Committee acknowledged the desirability of these characteristics and recommended a committee of between seven and twelve members. It hoped that "a tradition would develop which would allow some alternation in the chairmanship between government and opposition members."[86] In the absence of a specific recommendation it is likely that the Committee anticipated a government majority on the committee.

3. Terms of Reference of a Scrutiny Committee

Given the recommendation that a single committee be established to scrutinize subordinate legislation, what should be the criteria for this review? Perhaps most specifically, should the matter of policy or the "merits" of regulations be open to question? (The comments of witnesses have been noted above.)[87] Ontario Chief Justice McRuer has defined the consideration of merits as "an evaluation of the need for . . . [the regulations] and their efficacy within the framework of the policy approved and provided for by the Act."[88] Although a clear distinction between policy and non-policy cannot be made, the Statutory Instruments Committee believed that scrutiny should exclude policy considerations. By "policy" it meant "something which relates directly to the substantive solutions embodied in regulations as a result of the content and purpose of the enabling statute." Certainly, the Committee continued,

> that policy in a regulation which is a direct reflection of the guides set forth in the enabling legislation should not be debated by the Scrutiny Committee, since this would amount to a re-consideration of the statute itself. Also, since one of the chief purposes of conferring the power to make regulations is to enable the Administration, which is supposed to have certain first-hand expertise, to devise solutions to problems as they arise, it could strike at the root of this purpose if the Scrutiny Committee had a general power to second-guess the Administration.[89]

However, the Committee would not exclude policy from parliamentary review per se; rather, it would leave it to regular standing committees which possessed "the necessary substantive expertise." A scrutiny committee should be able to refer policy matters to them for consideration.[90]

The only Committee members who publicly stated their views relating to policy review were Brewin and MacGuigan. Both statements were consistent with the Committee's recommendations.[91]

If a scrutiny committee is to be denied the right to discuss policy, what should its terms of reference be? It is evident that the guidelines for the British House of Commons committee influenced the governments of both Manitoba and Saskatchewan (the only provinces which had scrutiny committees in 1969), the proposal which the Government of Canada made to the Statutory Instruments Committee, and the recommendations of that Committee.[92] The Committee recommended that regulations be examined on the basis of the following criteria:

> (a) Whether they are authorized by the terms of the enabling statute.
> (b) Whether they appear to make some unusual or unexpected use of the powers conferred by the statute under which it is [sic] made.
> (c) Whether they trespass unduly on personal rights and liberties.
> (d) Whether they have complied with the provisions of the Regulations Act with respect to transmittal, certification, recording, numbering, publication or laying before Parliament.
> (e) Whether they
>   (i) represent an abuse of the power to provide that they shall come into force before they are transmitted to the Clerk of the Privy Council or
>   (ii) unjustifiably fail to provide that they shall not come into force until published or until some later date.
> (f) Whether for any special reason their form or purport calls for elucidation.

Among the criteria which applied in some or all of the other three jurisdictions noted above, but which the Statutory Instruments Committee omitted, are the following:

(a) Whether regulations impose a charge on the public revenue (applied in the United Kingdom and Saskatchewan);

(b) Whether regulations impose a tax (applied in all three jurisdictions);

(c) Whether regulations are retroactive without statutory justification (applied in all three jurisdictions);

(d) Whether regulations impose a penalty (applied in Manitoba);

(e) Whether regulations contain substantive legislation which should be enacted by the legislautre (applied in Manitoba and probably Saskatchewan [See Minutes, p. 122]);

(f) Whether regulations are to be immune from judicial review (applied in all three jurisdictions).

The Committee explained these omissions:

> We would expect that the members of the scrutiny Committee would adopt a common-sense approach to the standards to be applied, within the general framework of a non-policy approach, and it seems to us that there would be no advantage in a proliferation of scrutiny items, such as had led to an overlapping of criteria in some other jurisdictions.[93]

It also pointed out that several of the criteria in other jurisdictions "appear to be questions relating to the terms of the statutory authority to make the regulation in question."[94] Indeed, all but the first and third of the above criteria omitted by the Committee were covered by the Committee's recommendations relating to enabling clauses. It should be noted, however, that regulations which transgressed these criteria could presumably be challenged only upon one of the grounds included in the scrutiny committee's terms of reference.

Four of the Government's suggested criteria for scrutinizing regulations were similar to those proposed by the Statutory Instruments Committee; three others were covered by the Committee's recommendations for enabling legislation. In addition, the Government thought that a scrutiny committee should look for regulations which impose a charge on the public revenue, or which "for any reason" should be referred for Parliament's "special attention." It is noteworthy that the Government included four of its criteria in its guidelines for enabling clauses as well.

The Committee also recommended that its proposed scrutiny committee, to which all regulations as defined in the Regulations Act should stand permanently referred, should normally meet in public; be permitted to meet when Parliament is not sitting, even after prorogation; have the usual powers of standing committees to call for persons, papers and records; and have the power "to request from regulation-making authorities memoranda supporting, explaining or otherwise clarifying regulations."[95] (The Government had suggested that a scrutiny committee have the added power to "remit" regulations, without affecting their legal status, to the department or other agency which made them, in order to express its "disapproval or concern . . . in a formal way.") Recognizing the need for expert staff, the Committee suggested that counsel be appointed by the Speaker to "examine all regulations referred to the [scrutiny] Committee, prepare reports thereon for the Committee, communicate with the various government departments and agencies on behalf of the Committee and assist the Committee in the preparation of its agenda."[96]

No reference was made to the possible review by the scrutiny committee of enabling clauses themselves.

4. Reports to Parliament

Should the scrutiny committee merely draw to Parliament's attention any regulations with which it is concerned, or should it recommend the amendment or annulment of these regulations? Further, should a motion to concur accompany the committee's report? Without such a motion what assurance would there be that the report would be debated by Parliament?

Baldwin asked Mallory "how we can ventilate in the House and/or in public the matters that the [scrutiny] committee deals with." Should reports be presented with motions to concur?[97] This "promising method had the disadvantage, in Mallory's view, that the committee would likely report infrequently. He added, however, that committee members might be able to draw "a particularly dubious and offensive" regulation to the attention of the House at the ten o'clock adjournment and on opposition days. He lamented the loss of opportunity of criticism which accompanied the shifting of the estimates from Committee of Supply to standing committees.[98]

Arthurs thought that a reviewing committee should report an offensive regulation, together with the defence prepared by the authority which made it, to the House "as a special matter . . . and an appropriate opportunity [should be] afforded for debate."[99]

Although Kersell believed that a Canadian committee would likely follow British practice and be a "consensus committee," he suggested that minority reports be permitted.[100] He did not say whether debate of committee reports should be assured.

Only during the testimony of Mr. Rutherford and Mr. Koester (the architects of scrutiny procedures in Manitoba and Saskatchewan) was there significant discussion of whether committee reports should contain recommendations, and whether they should be accompanied by motions to concur.

The Manitoba practice[101] favours recommendations and concurrence motions. Passage of such motions requires regulation-making authorities to act according to the recommendations. The advantage of this procedure, Rutherford maintained, is that responsibility for initiating remedial action does not rest with individual committee members. He added that the committee "definitely does not discuss policy, or the merits" of regulations; that it has always functioned in a non-partisan way; that its reports have always been unanimous; and that the question of confidence in the Government has never been raised in relation to offending regulations made either by a department or the Lieutenant-Governor-in-Council.[102]

Koester presented the opposing view:[103]

> The factual report, which contains no recommendations and which leaves any member free to initiate further proceedings with respect to a regulation, is a condition precedent to the effective operation of the committee.

This procedure would, he thought, avoid "a potential political crisis" because the committee's report was not "by any means the final judgement." It would also make it easier for the legislature to act upon only part of the report inasmuch as a committee member would likely move to amend or repeal offending regulations. At the same time, he noted, the procedure would not prevent the Government from correcting any or all regulations of which the committee was critical. Koester added that the scrutiny committee has yet to report an offending regulation to the legislature, although about fifty regulations each year (out of a total of between three hundred and four hundred) have been the subject of correspondence between the committee's counsel and regulation-making authorities.

Question six of the Statutory Instruments Committee's questionnaire asked

> What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that regulations made under legislation administered by your Department or Agency would be subject to scrutiny by a parliamentary committee which did not have the power to amend them?

Regulation-making authorities were generally not opposed to this review, and some envisaged useful results. Fortunately, only two replies expressed the view that parliamentary scrutiny would merely duplicate existing review by the executive.[104] Most authorities agreed that the time which would be spent explaining or defending regulations would be a significant addition to their work load. They were also concerned that the work of a scrutiny committee would create uncertainty about the fate of regulations, and that this would in fact delay their implementation.

The Statutory Instruments Committee urged[105] that a scrutiny committee "have the same power as other Standing Committees to report to the House," and that it report not only on individual regulations but also, "from time to time, [on] the regulation-making process generally." Although it avoided the two issues discussed in this section--whether reports should contain recommendations and be accompanied by motions to concur--the Committee did state that reports should state "some expression of opinion" concerning regulations drawn to the attention of the House. "The nature of the report," however, "is for the [scrutiny] Committee to decide at the appropriate time." Before the committee reports, regulation-making authorities should have had the opportunity to amend, withdraw, or explain offending regulations.

The Committee had hoped to give more consideration during the following session of Parliament to the mechanics of ensuring debate of scrutiny committee reports. However, the Committee was not reconstituted. The Government had recommended to the Committee that both houses set aside "a certain time on a regular basis" for this purpose.[106]

5. Annulment and Affirmative Resolutions

The Statutory Instruments Committee recommended that "normally Parliament should exercise its power of review by a resolution that a questionable regulation be referred to the Government for reconsideration." Such a motion and attendant debate would, the Committee thought, have a "persuasive influence on the Government" rather than result in the marshalling of the Government's voting strength to defeat an annulment motion or carry an affirmative resolution.[107] Nevertheless, the Committee believed that provision for annulment or affirmative resolutions had a place "where appropriate" in individual statutes. It could not suggest a list of guidelines, but suggested that these "restrictive controls" would be appropriate "when Parliament is enabling subordinate legislation to be made in new areas affecting matters of large consequence to the public." Indeed, the scrutiny committee itself might be able to make recommendations in this area after it gained experience.[108]

Of the witnesses who appeared before the Statutory Instruments Committee only Arthurs supported the annulment resolution, although he recognized that it would cause uncertainty until the time allowed for annulment had expired.[109] Abel doubted that Parliament had sufficient time to consider annulment if such a provision were included in many statutes.[110] Kersell opposed the procedure mainly because these motions were almost certainly doomed to defeat.[111] On the other hand, he thought that an affirmative resolution would be appropriate for "any instrument which either imposes a charge or provides for an expenditure, or any instrument that has an important legislative effect." He noted skeletal legislation in particular.[112]

Almost all of the replies to question five of the Committee's questionnaire were concerned that the uncertainty which provision for annulment would create would in fact delay the operation of regulations notwithstanding the fact that they could legally come into force at an earlier date.[113]

Regulation-making authorities also criticized the requirement, hypothesized in question four, that the House of Commons affirm regulations before they become effective. The inconvenience would be more serious if the House were not sitting when regulations were made.[114]

H. Conclusion

It is tempting, in retrospect, to say that the broad outlines of the Statutory Instruments Committee recommendations were predictable--basically, that formal scrutiny of subordinate legislation by a parliamentary committee is the only practical and systematic way to give members of Parliament the opportunity to react to such legislation (recommendations 19 to 22); further, that certain prior conditions must be met for this scrutiny to be effective: (a) enabling clauses themselves should meet certain standards (recommendations 7 and 8), (b) greater assurance is needed that documents of a legislative nature made pursuant to statutes are subject to formal executive and legislative review (recommendations 1 to 6, 10, 11 and 13), and (c) the existence of regulations must be made known to members of Parliament and the public (recommendations 9, 12, and 14 to 18).

These recommendations were predictable because they conformed to policy which had been adopted in other jurisdictions, they were urged by many of the witnesses, and the Canadian cabinet apparently supported them. Indeed, creation of a scrutiny committee had become virtually a "motherhood" symbol.

Because the Statutory Instruments Committee was not pioneering in this area it is not surprising that its study was not as comprehensive as, for example, that performed by the British Committee on Ministers' Powers. The work of the latter Committee, the resulting British experience and literature in the field, were "givens" for the Canadian Committee.

At no time did the Committee explain its choice of witnesses. However, inasmuch as few Canadians at that time appeared to be absorbed by the question of parliamentary scrutiny, the Committee seemed to pick those few who could make worthwhile contributions to the discussion. In addition, Professors Abel and Baum contributed from their knowledge of and experience with United States procedures. It might also have been worthwhile to hear from someone who could describe current British practice.

The attendance of officials from the Department of Justice and Privy Council Office is easily explained. The Department of Manpower and Immigration was also a logical choice inasmuch as the Immigration Act delegates some of the broadest discretionary powers in Canada. Much important information was, of course, obtained from all regulation-making authorities through the Committee's twenty-three point questionnaire. (The Government replied on behalf of all authorities to questions 13, 16, 17, 18, 21, 22, and 23).

It is unfortunate that the House of Commons did not discuss the Committee's Third Report, although in retrospect, and judging from the relatively small number of members of the House who during the following session showed interest in the question of subordinate legislation, or who during the 1970-72 session participated in the debate of the Statutory Instruments Bill, such a discussion would probably have produced nothing more than a few speeches in general support of the Committee's recommendations. Inasmuch as the Government was already on record favouring the tenor of these recommendations, but evidently was not prepared until June, 1970, to make a significant statement, a debate before then might have been of little value.

Footnotes

[1] See Chapter III. This conclusion is further confirmed by the detailed research done for that Chapter.

[2] Kersell, Parliamentary Supervision, p. 115.

[3] See, for example, St. Laurent's comment quoted above, p. 61.

[4] H. of C. Debates, September 24, 1968, p. 438.

[5] Ibid., September 16, 17, 1968, pp. 73, 111-112, 107.

[6] Ibid., September 25, 1968, p. 471.

[7] Ibid., September 30 and 25, 1968, pp. 582, 474. Other speakers were Conservatives Baldwin (September 25, pp. 471-473) and Lundrigan (September 25, pp. 476-478), and New Democrat Stanley Knowles (September 25 and 30, pp. 478-479, 577-580).

[8] Ibid., November 8, 1968, p. 2624. The Liberals were Messrs. Forest, Gibson, Hogarth, MacGuigan, Marceau, Murphy, and Stafford. Mr. Jean-R. Roy replaced Murphy on June 27, 1969, but Murphy returned three meetings later on September 17. The Conservatives were Messrs. Baldwin, McIntosh (replaced after two meetings by Mr. McCleave on April 21, 1969), and Robert Muir. Mr. Brewin was the New Democrat, and Mr. Tétrault the Creditiste.

[9] Professor H. W. Arthurs, Associate Dean, Osgoode Hall Law School; Professor C. L. Brown-John, Assistant Professor of Political Science, University of Windsor; Professor J. R. Mallory, Chairman, Department of Economics and Political Science, McGill University; Professor A. S. Abel, Faculty of Law, University of Toronto; Professor J. E. Kersell, Associate Professor of Political Science, University of Waterloo; Mr. G. S. Rutherford, Revising Officer, Department of the Attorney-General, Government of Manitoba; Mr. C. B. Koester, Clerk of the Legislative Assembly, Government of Saskatchewan; and Professor D. J. Baum, Visiting Professor, Faculties of Law Administrative Studies, Environmental Studies, York University. The departments appearing were Transport, Manpower and Immigration, Justice, and the Privy Council Office.

[10] In its first report, concurred in on November 18, 1968, the Committee recommended "that it be empowered: (1) to send for persons, papers and records; (2) to print such papers and evidence as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto." Its second report was concurred in on February 17, 1969, and in it the Committee recommended "that it be empowered to sit while the House is sitting, to sit during periods when the House stands adjourned, to delegate to subcommittees all or any of the powers of the Committee except the power to report direct to the House; to retain the

services of Counsel and Assistant Counsel." (Ibid., November 18, 1968, and February 17, 1969, pp. 2833, 5571.) For texts of these reports, see Statutory Instruments Committee, Minutes, November 13, 1968, p. 1-4.

[11] Some discretion was required in assigning numbers of columns to individual members. For example, comments by MacGuigan which were obviously made in his capacity of chairman were excluded, as were a few brief but irrelevant remarks of some other members.

[12] For a partial list, see Statutory Instruments Committee, Minutes, (Appendix "I"), June 27, 1969, pp. 250-251.

[13] Ibid., pp. 229, 231. H. of C. Debates, July 10, 1969, p. 11,085.

[14] Statutory Instruments Committee, Third Report, pp. vii, viii.

[15] See above, pp. 87-88.

[16] Statutory Instruments Committee, Minutes, June 19, 1969, pp. 169-170. Some of the directives of the Marine Branch "are not actually orders," said Mr. Fortier (Director, Legal Services and Counsel), but, rather, "suggestions" to mariners. (P. 168.)

[17] Ibid., June 26, 1969, pp. 193-209. The regulations allowed an officer to admit an applicant who was otherwise inadmissable, or to refuse admission to an otherwise admissable applicant, provided that the officer's reasons were approved by "an officer of the Department designated by the Minister."

[18] Ibid., p. 198.

[19] Ibid.

[20] Ibid., pp. 198, 199. He added (p. 201) that perhaps some of these documents "ought to be dealt with in a different fashion [i.e., as regulations] provided we recognize the pitfalls of tying the administrators of legislation into such a bind that in the end they wind up not being able to do what they think should be done because the law will not let them."

[21] Ibid., p. 199.

[22] Statutory Instruments Committee, Third Report, p. 24.

[23] The term "order" has been used to refer to administrative, judicial, legislative, and prerogative acts. (See ibid., p. 12.)

[24] Ibid., p. 13.

[25] Ibid., p. 14. These legal consequences include (p. 15) the requirements of the Regulations Act, exemption of subordinate legislation from the rules of natural justice, and the fact that regulations cannot be held invalid because of unreasonableness.

[26] Ibid., p. 27.

[27] The Minister of Justice was suggested as the final authority. McCleave and Hogarth had urged that the Minister be required to approve all regulations so that he could decide which fell under the Regulations Act. (Minutes, June 27, 1969, pp. 237-238.)

[28] Statutory Instruments Committee, Third Report, p. 29.

[29] Ibid., pp. 10, 27.

[30] Quoted ibid., p. 29.

[31] Statutory Instruments Committee, Minutes, April 22, 1969, p. 10.

[32] Ibid., p. 21.

[33] Ibid., p. 25.

[34] R. E. Williams, ibid., June 26, 1969, p. 200.

[35] Statutory Instruments Committee, Third Report, pp. 31-33, 39-40.

[36] Statutory Instruments Committee, Minutes, June 27, 1969, p. 242.

[37] Ibid., (Appendix "J"), October 7, 1969, p. 259.

[38] Statutory Instruments Committee, Third Report, pp. 39-40.

[39] Statutory Instruments Committee, Minutes, May 13, 1969, pp. 78-84. Professor Abel saw "no impropriety . . . at all" about subdelegation. The principle of delegatus non potest delegare has now been accepted as not applying to "the operations of government," he said. (May 1, 1969, pp. 73-74.)

[40] Ibid., May 13, 1969, p. 81. Turner made this suggestion later when the Standing Senate Committee on Legal and Constitutional Affairs was considering Senator Martin's motion. (See below, p. 358 and Minutes of that Committee, June 17, 1970, p. 6:12). Kersell told the Statutory Instruments Committee that the British House of Commons scrutiny committee performs this review function even though no provision is made in the terms of reference. (May 13, 1969, pp. 94-95.)

[41] Statutory Instruments Committee, Third Report, p. 42.

[42] Ibid., pp. 90-91. These are discussed in the Report on pp. 33-40.

[43] Statutory Instruments Committee, Minutes (Appendix "J"), October 7, 1969, p. 255.

[44] Statutory Instruments Committee Third Report, p. 42. The Committee assumed that the Bill of Rights would afford some protection of personal rights and liberties, and it suggested that a scrutiny committee consider whether these rights and liberties are violated by regulations. (P. 79.)

[45] Ibid., p. 42.

[46] See above, p. 83.

[47] Statutory Instruments Committee, Minutes, June 19, 1969, pp. 153-159, 171-173.

[48] See above, p. 81.

[49] Statutory Instruments Committee, Exhibit QQ, pp. 437, 1261.

[50] The 1967 study of the Government's White Paper on Canadian Immigration Policy by the Joint Parliamentary Committee on Immigration is an obvious example but also a special case. Mr. Beasley, Director of the Home Services Branch (Immigration) of the Department of Manpower and Immigration, told the Statutory Instruments Committee that "suggestions made by the [Joint Parliamentary] Committee during the hearings were in large part incorporated into the resulting regulations of October 1, 1967." (Minutes, June 26, 1969, p. 178.)

See the replies (Exhibit QQ) of the Department of Veterans Affairs (p. 1226), the Department of Industry, Trade and Commerce (p. 326), the Department of Agriculture (p. 752), the Canada Council (p. 1833), and the War Veterans Allowance Board (p. 1189).

[51] Statutory Instruments Committee, Third Report, pp. 47-48.

[52] Ibid., p. 48.

[53] Ibid., p. 49.

[54] Statutory Instruments Committee, Minutes, April 22, 1969, pp. 14-15.

[55] Statutory Instruments Committee, Third Report, p. 52.

[56] Ibid., p. 53.

[57] *Ibid.*, p. 57.

[58] Statutory Instruments Committee, *Minutes*, April 22, 1969, p. 14.

[59] *Ibid.*, May 13, 1969, p. 88.

[60] Statutory Instruments Committee, *Third Report*, p. 59. Presumably, the reference is to regulations as defined by the Regulations Act.

[61] Statutory Instruments Committee, *Minutes*, June 27, 1969, p. 222.

[62] *Ibid.*, (Appendix "J"), October 7, 1969, p. 254. The circumstances are as follows: "(a) where notification or other form of communication would be more appropriate; (b) where the safety and security of the country or part of it might be adversely affected; (c) where information might be disseminated which could deleteriously affect Canada's foreign relations; (d) where the regulation involves the distribution of information which might adversely affect the relations of the provinces *inter se*; (e) where the regulations are of limited application and involve the granting of privileges or the relaxing of rules; (f) where other conditions from time to time necessitate that a regulation should be exempt from publication or that its publication be postponed provided that the provisions of the *Regulations Act* are complied with; (g) an extension of the time normally allowed for the publication of a regulation may be necessitated where the matter is one of urgency."

[63] At least three times during the Committee's hearings, MacGuigan asked why all regulations and orders-in-council should not be published. Dr. Baum suggested two types of exceptions (*Minutes*, June 3, 1969, p. 146); J. Fortier, Director of the Department of Transport's Legal Services and Counsel, saw no reason from that Department's point of view (*Minutes*, June 19, 1969, p. 166); J. L. Cross, supported by Privy Council President Macdonald, suggested that the reason was lack of general interest in many of these instruments (*Minutes*, June 26, 1969, p. 220).

[64] The question of regulations' effective dates did not arise during the Committee's hearings except in relation to publication. See for example, Kersell's comments. (*Minutes*, May 13, 1969, pp. 85-88.)

[65] *S. C., 1967-68*, c. 7, s. 6(2): "Every enactment that is not expressed to come into force on a particular day shall be construed as coming into force upon the expiration of the day immediately before the day the enactment was enacted." Section 2(1) provides that an "enactment" includes a regulation and that "to enact" includes "to make."

[66] Statutory Instruments Committee, *Third Report*, pp. 54-56.

[67] For example, the Income Tax Appeal Board reported that "our

policy has always been to issue as few regulations as possible," and the Department of Regional Economic Expansion stated that many of its regulation-making powers have not been used. (Statutory Instruments Committee, Exhibit QQ, pp. 66, 1579.)

[68] Morden, "Survey," p. 90. Morden elaborates on pp. 90-91.

[69] Statutory Instruments Committee, Third Report, pp. 60-62. See recommendation 19(9)(e)(ii) on p. 93.

[70] Ibid., p. 62. The Government's answer to question seventeen stated that the only "inhibiting factors are purely administrative." (Minutes [Appendix "J"], October 7, 1969, p. 254.)

[71] Statutory Instruments Committee, Minutes, June 27, 1969, pp. 235-236.

[72] Statutory Instruments Committee, Third Report, pp. 64-66.

[73] Statutory Instruments Committee, Minutes, May 13, 1969, pp. 89-94, 100-101.

[74] Ibid., April 22, 1969, pp. 32-33.

[75] Ibid., May 13, 1969, p. 89.

[76] Statutory Instruments Committee, Third Report, p. 75.

[77] Statutory Instruments Committee, Minutes (Appendix "J"), October 7, 1969, p. 255.

[78] Ibid., April 22, 1969, pp. 13-14.

[79] Ibid., pp. 16-17, 19.

[80] Ibid., pp. 16-17.

[81] Ibid., June 26, 1969, p. 179.

[82] Ibid., May 13, 1969, p. 89.

[83] Ibid., May 13, 1969, pp. 93, 101 (Kersell); May 1, 1969, p. 75 (Abel); April 22, 1969, p. 39 (Brown-John). Kersell noted (p. 100) that the British House of Commons scrutiny committee avoids the proscription of policy consideration by reporting regulations that make unusual or unexpected use of delegated authority.

[84] Ibid., April 29, 1969, pp. 52-61 (passim).

[85] Statutory Instruments Committee, *Third Report*, p. 75.

[86] *Ibid*., pp. 76-77.

[87] Abel felt that if his recommendations for the making of regulations were adopted, the only necessary post-review would be "the kind of thing that the British have for . . . abnormalities." Furthermore, policy scrutiny would be "just impossible" and contrary to the purpose of delegation. (Statutory Instruments Committee, *Minutes*, May 1, 1969, pp. 71-72.)

[88] Ontario, Royal Commission Inquiry into Civil Rights, *Report No. 1*, p. 377.

[89] Statutory Instruments Committee, *Third Report*, p. 78.

[90] *Ibid*., p. 78.

[91] Statutory Instruments Committee, *Minutes*, April 22, June 26, 1969, pp. 16, 179 (Brewin); April 29, 1969, p. 61 (MacGuigan).

[92] For enumerations of these criteria see Statutory Instruments Committee, *Third Report*, pp. 69-70, 79-80; and *Minutes* (Appendix "J"), October 7, 1969, pp. 255-256. (The *Third Report* omits three Manitoba criteria listed in the *Minutes*, May 15, 1969, p. 107.) The United Kingdom criteria also formed the basis of Brown-John's proposal to the Committee. (*Minutes*, April 22, 1969, p. 33.)

[93] Statutory Instruments Committee, *Third Report*, pp. 78-79. It did not deny the possibility of some overlapping of its own criteria.

[94] *Ibid*., p. 79.

[95] *Ibid*., pp. 75, 77, 80. Kersell was the only witness to urge *in camera* meetings. This was the practice in other countries with which he was familiar, he said, and he thought it encouraged informality in meetings and in making representations to the Government. (*Minutes*, May 13, 1969, p. 99.) The meetings of the Manitoba and Saskatchewan scrutiny committees were open to the public. (*Minutes*, May 15, 1969, pp. 112, 120.)

[96] Statutory Instruments Committee, *Third Report*, p. 77.

[97] Statutory Instruments Committee, *Minutes*, April 29, 1969, p. 57.

[98] *Ibid*., pp. 53-58, 71.

[99] *Ibid*., April 22, 1969, p. 13. It will be recalled that Arthurs

recommended scrutiny by subject-matter standing committees.

[100] Ibid., May 13, 1969, p. 99.

[101] Ibid., May 15, 1969, pp. 111, 115, 124.

[102] Ibid., p. 107. He estimated that forty-three regulations had been amended and thirteen repealed by the legislature as a result of committee recommendations.

[103] Ibid., pp. 116-117, 119, 124.

[104] Statutory Instruments Committee, Exhibit QQ, pp. 53, 55 (Department of Communications); p. 1414 (Department of Transport, Aids to Navigation Branch).

[105] Statutory Instruments Committee, Third Report, p. 80.

[106] Statutory Instruments Committee, Minutes (Appendix "J"), October 7, 1969, p. 256. The Government anticipated (p. 255) "periodic reports at such intervals as . . . [the scrutiny committee] may determine," as well as ad hoc reports to draw Parliament's attention to specific regulations.

[107] Statutory Instruments Committee, Third Report, p. 88.

[108] Ibid., pp. 88-89. The Committee counted nine statutes which contained provisions for annulling regulations; the present study counted ten. The discrepancy is explained by the fact that the Committee included one statute passed during the 1968-69 session, and the fact that two of the provisions included in the present study had been repealed by the Regulations Act. By counting only two Acts which required parliamentary affirmation of regulations the Committee excluded the Library of Parliament Act (R. S. C., 1952, c. 166, s. 4) which authorized the speakers of both houses to make regulations to be "subject to the approval of the two houses of Parliament."

[109] Statutory Instruments Committee, Minutes, April 22, 1969, p. 23.

[110] Ibid., May 1, 1969, p. 76.

[111] Ibid., May 13, 1969, p. 98. He noted that the few occasions when these motions had been carried in the British House of Commons were the results of "snap votes." The same reason applied to the failure of affirmative resolutions, he said. (P. 97.)

[112] Ibid., p. 95.

[113] Statutory Instruments Committee, Third Report, p. 86.

[114] Ibid. Koester commented that the short sessions in Saskatchewan made "impossible" the use of annulment and affirmative resolutions. (Statutory Instruments Committee, Minutes, May 15, 1969, p. 116.)

CHAPTER VII

THE SECOND SESSION OF THE TWENTY-EIGHTH PARLIAMENT (1969-70)

The survey of statutes in force in 1967-68 revealed that much power had been delegated to individual ministers, the Governor-in-Council, and other agencies. Study of the debates of control measures contained in those statutes, however, uncovered relatively little demand for improved scrutiny techniques.[1] Nevertheless, the House of Commons established, upon Government initiative, the Special Committee on Statutory Instruments which undertook the study discussed in the last Chapter. The present Chapter considers the nature and extent of delegation, provisions for its control, and the concerns about subordinate legislation expressed by means of all the opportunities available to members of Parliament, in one full session--the second of the twenty-eighth Parliament, which began on October 23, 1969, and prorogued on October 7, 1970.

Why was this session selected? In the first place, it was the first full session during which the House of Commons functioned under the new rules passed in December, 1968, and July, 1969; second, it was a session of majority government, which Canadians probably regard as normal or at least desirable; and third, this session predated passage of the Statutory Instruments Act and establishment of the Joint Committee on Regulations and other Statutory Instruments. Hopefully, conclusions drawn from this case study can be expected to have more general application.

A. Some Characteristics of Public Bills on the Order Paper

As shown by Table 10, 96 (34 per cent) of the 282 public bills placed on the order paper (excluding Bill C-1 and Bill S-1) contained enabling clauses. Eighty-three per cent (60/72) of the Government bills but only 17 per cent (36/210) of the private members' bills were included in these figures. One reason for the great difference may be that most private members' bills relate to a fairly narrow topic whereas Government bills are frequently more comprehensive. Another reason may be that the Government has a greater awareness of the administration required to implement legislation. A third reason might be that private members try to avoid delegating authority.

Of the 73 bills which became law, 70 per cent (51 bills) delegated power.[2] This compares with 61 per cent (417/679) of the 1967-68 statutes-in-force, and suggests that the need for parliamentary scrutiny of subordinate legislation is not decreasing.

Although all public bills on the order paper are included in the following analysis, little significance should be attached to the frequency or types of delegated power in those, especially private members' bills, which did not become law. This is particularly true of bills which went no farther than first reading because, in the absence of parliamentary debate, they may have represented little if anything more than the views of their sponsors.

TABLE 10

NUMBER OF PUBLIC BILLS[a] ON THE 1969-70 ORDER PAPER

	Number of Bills					
	H. of C.		Senate		Total	
	Gov't.	P. M.[b]	Gov't.	P. M.	Gov't.	P. M.
All bills						
Total	58	207	14	3	72	210
Delegating authority	49	36	11	. .	60	36
With control provisions	15	1	4	. .	19	1
First reading only						
Total	3	174[c]	. .	. .	3	174
Delegating authority	3	31	. .	. .	3	31
With control provisions	1	1	. .	. .	1	1
Beyond first reading, but not law						
Total	5[d]	24[e]	1[f]	2[g]	6	26
Delegating authority	5	4	1	. .	6	4
With control provisions	5	. .	. .	. .	5	. .
Becoming law						
Total	50	9[h]	13	1	63	10
Delegating authority	41	. .	10	. .	51	. .
With control provisions	10	. .	4	. .	14	. .

[a] Excluding Bill C-1 and Bill S-1.

[b] "P. M." indicates private members' bills.

[c] The subject matters of twelve (including seven amendments to the Elections Act) were referred to a standing committee; two were withdrawn in favour of acceptance by the Government; thirty-seven, introduced by R. Stewart, called for the placing of members of Parliament on boards of directors of government bodies; two were identical except for their sponsors.

[d] Four were not reported from committee; one was not acted upon at the report stage because of prorogation.

[e] Twenty were talked out on second reading; one was defeated on second reading; three were not reported from committee.

[f] Bill S-3 received third reading in the Senate but was replaced by Bill C-161 in the House of Commons.

TABLE 10--Continued

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[g] Bill S-21 received third reading in the Senate but only first reading in the House of Commons.

[h] All were amendments to the Electoral Boundaries Readjustment Act.

This part of the Chapter follows the organization adopted in Chapter II for discussing the significant characteristics of delegated power. Comments made in that Chapter concerning the propriety of certain characteristics are, of course, relevant here. Following that discussion the presence of specific control measures is noted.[3] As in earlier Chapters, the terms "regulations" and "subordinate legislation" are used even though the bills employed a miscellany of words.

1. Delegated Power

(a) Recipients of delegated power

(i) Bills which became law

Fifty-one of the bills which delegated power became law. All were introduced by the Government. Of these, 23 delegated authority solely to the Governor-in-Council, while another 24 made delegations to the cabinet and some other agent. In other words, 92 per cent (47/51) of the bills delegated power to the cabinet. This compares with 79 per cent (331/417) of the 1967-68 statutes-in-force.[4]

Table 11 shows the frequency of delegation to individual ministers (including the Treasury Board). Regulations under ten of the twenty-five statutes represented in this Table required the approval of cabinet or another minister.

Four Acts delegated power, the exercise of which required cabinet or ministerial approval, to other agencies.

TABLE 11

FREQUENCY OF DELEGATIONS TO INDIVIDUAL MINISTERS (1969-70 BILLS BECOMING LAW)

Minister	Number of Statutes[a]		
	Sole Recipient	One of at Least Two Recipients	Total
Attorney-General	1	. .	1
Consumer and Corporate Affairs	. .	4	4
Energy, Mines and Resources	. .	1	1
Finance	1	8	9
Fisheries	. .	1	1
Indian Affairs and Northern Development	. .	3	3
Industry	1	. .	1
National Defence	. .	1	1
National Health and Welfare	. .	2	2
National Revenue	. .	1	1
Public Works ("or as designated")	. .	1	1
Solicitor General	. .	1	1
Treasury Board	. .	3	3
Minister as designated by cabinet	. .	3	3

[a] Each of seven statutes delegated power to two ministers. This explains why there are thirty-two Acts in the "Total" column representing twenty-five different statutes.

(ii) Bills which went beyond first reading but did not become law

The recipients of power in these six Government bills and four private members' bills are indicated in Table 12.

(iii) Bills which did not proceed beyond first reading

Only three Government bills were in this category. The Bail Reform Bill delegated power only to the cabinet; the Tax Review Board Bill, to the cabinet and (with cabinet approval) the Tax Review Board; and the Deuterium of Canada Assistance Bill delegated authority to the Minister of Regional Economic Expansion who could act upon a request

TABLE 12

RECIPIENTS OF POWER (1969-70 BILLS BEYOND FIRST READING BUT NOT BECOMING LAW

Recipient	Number of Statutes	
	Sole Recipient	One of at Least Two Recipients
Governor-in-Council		
Government bills	1	5
Private members' bills	2	1
Minister		
Government bills	. .	5[a]
Private members' bills	1[b]	1[c]
Other (with cabinet approval)		
Government bills	. .	. .
Private members' bills	1	. .

[a] Finance (two bills), Agriculture, Treasury Board, minister designated by the cabinet. (Cabinet approval required for one bill.)

[b] Public Works.

[c] Secretary of State.

of the Province of Nova Scotia.

Among the thirty-one private members' bills were eighteen which delegated power to the cabinet alone; four, to the cabinet and another body; and two bills which left the recipient of power unspecified. In three bills, other agencies received power requiring cabinet or ministerial approval for its use. Delegation to individual ministers is shown in Table 13.

Considering all bills on the 1969-70 order paper which contained enabling clauses, it is apparent that the emphasis, found in the 1967-68 statutes-in-force, on the Governor-in-Council as a recipient of delegated

TABLE 13

FREQUENCY OF DELEGATION TO INDIVIDUAL MINISTERS (1969-70 PRIVATE MEMBERS' BILLS NOT BEYOND FIRST READING)

Minister	Number of Statutes Sole Recipient	One of at Least Two Recipients	Total
Agriculture	1	. .	1
Consumer and Corporate Affairs	. .	1	1
National Health and Welfare	2	. .	2
Trade and Commerce	1	. .	1
Transport	1	. .	1
Veterans Affairs	1	. .	1
As designated by the cabinet	1	. .	1

authority was continued.

(b) Authority to subdelegate power

Three Government bills which became law, three others which went beyond first reading, and three private members' bills which received first reading only,[5] permitted the redelegation of delegated power. The recipients of subdelegated power are shown in Table 14.

(c) Authority to make regulations having retroactive effect

The amendment (c. 70) to the Canada Corporations Act permitted the Minister of Consumer and Corporate Affairs to make exemptions from the requirement to report or disclose inside interest in a company. These exemptions could, "if the Minister so decides . . . have retrospective effect" (s. 7).[6]

(d) Authority to impose penalties for contravention of regulations

This power was contained in six Government bills which became

TABLE 14

FREQUENCY OF AUTHORITY TO SUBDELEGATE (1969-70)

Recipient of Power to Subdelegate	Recipient of Redelegated Power (Number of Instances)			
	Minister	Other Body	Unspecified	Total
Bills becoming law				
Governor-in-Council	2[a]	. .	2[b]	4
Bills beyond first reading				
Governor-in-Council	. .	1	1[c]	2
Minister	. .	1	. .	1
Other	. .	1	. .	1
Bills first reading only				
Governor-in-Council	. .	3	. .	3

[a] The Arctic Waters Pollution Prevention Bill (c. 47, s. 26) authorized the delegation of all authority given to the Governor-in-Council, except that specified as the making of regulations.

[b] The amendment (c. 43) to the Oil and Gas Production and Conservation Act denoted in two places (s. 6) the recipient as "the Minister or such other person as the Governor in Council deems suitable."

[c] The Federal Court Bill (C-192, s. 54) permitted the Governor-in-Council to empower people he thinks necessary to do certain specified things.

law, two Government bills and one private member's bill which went beyond first reading, and six private members' bills which were given only first reading. Table 15 summarizes these delegations.

A comparison of the 1967-68 statutes-in-force and the bills on the 1969-70 order paper shows a continued preference for stating maximum penalties. However, whereas only one Act in 1967-68 left unspecified the recipient of power to impose a penalty, only one of the 1969-70 bills did state the recipient.

TABLE 15

FREQUENCY OF AUTHORITY TO IMPOSE PENALTIES (1969-70)

Recipient of Authority	Number of Bills	Type of Penalty Prescribed		Maximum Penalty Prescribed	
		Yes	No	Yes	No
Bills becoming law					
A court	1	. .	1	. .	1
Not specified	5	3	2	3	2
Bills beyond 1r					
Not specified	3	3	. .	3	. .
Bills 1r only					
Not specified	6	6	. .	6	. .

Of the six bills which became law, the Northern Inland Waters Bill (c. 66, ss. 33, 34) specified a court as the recipient of authority; this bill and three others stated that violators are "guilty of an offence punishable on summary conviction." It would seem that the intent was for courts of law to establish guilt and punishment. The other two of the six bills, however, stated only that violators are liable to certain penalties.

(e) Authority to levy a charge payable to a public body

Seven bills which became law delegated this power, all to the Governor-in-Council and all without stating amounts or maxima.[7] Six charges were fees, four of them for letters patent. The seventh delegation, tantamount to the right to tax, authorized the cabinet to exempt from, or determine when transportation begins or ends for the purpose of, the air transportation tax created by the Excise Tax Bill (c.

7, s. 18[c], [d]).

Two Government bills which went beyond first reading were also in this category. The National Parks Amendment Bill (C-152, s. 4[1]) permitted the cabinet to make regulations providing for the voluntary payment of traffic fines; and the Federal Court Bill (C-192, s. 46[1]) authorized, without stating maxima, certain fees and costs to be determined by judge-made rules.[8]

Two private members' bills which got no further than first reading authorized the prescribing of fees, by the minister (who is not identified) under the Rainmaking Bill (C-86, s. 5[1]), and by the cabinet under the Motor Vehicle Inspection (Safety Standards) Bill (C-108, s. 3). No maxima were stated.

(f) Authority to impose a charge on the public revenue

Twelve bills passed during the session delegated authority, in some bills to more than one body, to impose charges on the public revenue.[9] Eleven of the sixteen delegations in these bills were to the Governor-in-Council, three were to individual ministers, one was to the Treasury Board, and one was to the Cape Breton Development Corporation (whose actions required cabinet approval and the recommendation of two ministers). The types of charges included the guaranteeing of loans, the determining of interest rates payable, the determining of payments to members of government boards, committees, etc., the making of grants and loans, and the making of pension contributions.

Of the bills which progressed beyond first reading, five introduced by the Government delegated this authority. Of the nine instances, three were delegations to the cabinet, four to individual ministers (three of them to the Minister of Finance), one was to the Treasury Board, and one was to the Board of Directors of the National Parks Leasehold Corporation. Most of the charges involved the determination of salaries payable to members of various bodies, but they also included the making of grants and loans. The sole private member's bill in this category authorized the Secretary of State to make grants to the Canadian Heritage Foundation, and the Governor-in-Council to guarantee loans made to the Foundation and interest thereon.

Of two Government bills which received only first reading, one permitted the cabinet to determine salaries and provide annuities, and the second authorized the Minister of Regional Economic Expansion to make grants.

(g) Authority to make regulations which conflict with those made under other statutes, or with other statutes themselves

Only the Canada Grain Bill (C-196), a Government bill which got to the report stage, allowed regulations to conflict with other legislation. Section 97 authorized the Governor-in-Council to do certain things by order, notwithstanding anything contained in the Canadian Wheat Board Act.

(h) Authority to amend the parent Act

The difficulty of precisely defining the concept of "amendment" was noted in Chapter II. Table 16 is patterned on Table 4.[10] The power to amend was contained in thirty-five of the bills which were passed, in seven which proceeded beyond first reading, and in fourteen

TABLE 16

FREQUENCY OF POWER TO AMEND PARENT ACT (1969-70)

"Amending" Power	Recipient (No. of Instances)[a]		
	Governor-in-Council	Minister (incl. Treasury Board)	Other Gov't. Body
Bills becoming law			
Determine when Act (or Part) in force	24	. .	. .
Determine when Act (or Part) terminates	1[b]	. .	. .
Change schedule	1	. .	. .
Define words	5[c]	1	. .
Adapt provisions of Act	2	. .	. .
Extend or restrict application of (or exemption from) Act or parts	8	4	. .
Defer implementation of, or suspend, parts of Act	. .	3	. .
Extend duration of Act beyond stated date	1[d]	. .	. .
Repeal parts of Act	2	. .	. .
Change minister responsible	. .[e]	. .	. .
Bills beyond first reading[f]			
Determine when Act (or Part) in force	6[g]	. .	. .
Change schedule	2	. .	. .
Define words	1	. .	. .
Adapt provisions of Act	1	. .	. .
Extend or restrict application of (or exemption from) Act or parts	. .	. .	1[h]
Do something "notwithstanding anything in this Act"	1	. .	. .
Bills first reading only[i]			
Determine when Act (or Part) in force	10[j]	. .	. .
Change schedule	1[k]	. .	. .
Define words	1	1	. .
Extend or restrict application of (or exemption from) Act or parts	3	1	. .
Do something "notwithstanding anything in this Act"	1	. .	. .

[a] The delegation of the same type of amending power to the same

TABLE 16--Continued

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person or body in the same Act is counted only once.

[b] Only if this determination is made before the stated expiry date (amendment to Company of Young Canadians Act, c. 5, s. 2).

[c] There is a thin line separating an explicit power to define from the power delegated to the Governor-in-Council by the Canada Water Bill (c. 52, s. 11[2]) to designate any federal waters as a water quality management area, or from the amendment to the Territorial Sea and Fishing Zones Act (c. 68, ss. 2, 4) to prescribe certain areas as fishing zones. Only explicit power to define is included in this table.

[d] A proclamation extending the Act's life must be laid before Parliament. (Shipping Conferences Exemption Act, c. 72. s. 14.)

[e] Although no bills made this provision, several left the determination of the responsible minister to the Governor-in-Council.

[f] All but one were Government bills.

[g] The Canada Grain Bill (C-196) stated the earliest date that the legislation would be effective. The sole private members' bill (C-35) in this part of the Table is only in this category.

[h] No approval was required, which makes this particular delegation the more significant. This is the Canada Grain Bill (C-196), which is in every category of this part of the Table.

[i] All but one were private members' bills.

[j] The sole Government bill (C-220) in this part of the Table is only in this category.

[k] B. C. Indian Land Question Bill, C-50. This change is possible only if the affected Indians agree.

which received first reading only. Forty-eight per cent (37/73) of the bills passed in 1969-70 delegated this amending power, which is a much higher proportion than the 27 per cent (185/679) of the 1967-68 statutes in force. Expressed as per centages only of the number of Acts which contained enabling clauses, the difference is slightly greater: 68 per cent (35/51) in 1969-70 as compared with 44 per cent (185/417) in 1967-68.

(i) Exemption from judicial review

No bills explicitly excluded judicial review, although decisions made under two of them which became law were to be "final and conclusive."[11] When Justice Minister Turner discussed his Federal Court Bill (C-192) he noted that one of its purposes was to eliminate privative clauses and to ensure that "in those quasi-judicial and judicial aspects of administrative decisions there is judicial review so the rules of natural justice can apply."[12] Legislation to create the new Court was passed during the following session.

None of the bills on the 1969-70 order paper contained "as if enacted by this Act" or "shall have the force of law" provisions.

(j) The generality of delegated power

Table 17 indicates the frequencies of delegated powers based upon the concept of generality developed in Chapter II.[13]

It will be recalled that in his submission to the Special Committee on Statutory Instruments, Privy Council President Macdonald stated that most subjectively-worded delegations could be eliminated. In the 1967-68 statutes-in-force, 24 per cent (224/938) of all delegations were of a subjective nature; in the 1969-70 statutes, only 14.5 per cent (20/138) were in this category.

As in 1967-68 most delegations in the 1969-70 statutes were to the Governor-in-Council. However, the increased relative importance of delegation to ministers in 1969-70 reduced that of the cabinet.

TABLE 17

GENERALITY OF DELEGATION, 1969-70 (NUMBER OF INSTANCES)[a]

Type of Recipient	Specified Regulation		Specified Purpose		Specified Subject		Carry out Act's (Part's) Provisions			Total		
	Obj.	Subj.	Obj.	Subj.	Obj.	Subj.	Obj.	"Deemed"[b]	Subj.	Obj.	Subj.	Total
Bills Becoming Law												
Governor-in-Council	42	4	8	2	17	. .	8	. .	. .	75	6	81
Minister (incl. Treas. Board)	22	8	3	3	5	2	. .	. .	1	30	14	44
Government body	9[c]	. .	. .	. .	2	. .	. .	. .	. .	11	. .	11
Other	1	. .	. .	. .	1	. .	. .	. .	. .	2	. .	2
Total	74	12	11	5	25	2	8	. .	1	118	20	138
Bills Beyond First Reading												
Governor-in-Council	10	3	1	. .	3	. .	1	. .	. .	15	3	18
Minister (incl. Treas. Board)	6	3	. .	1	2	. .	. .	. .	. .	8	4	12
Government body	6[d]	. .	1	. .	1	. .	1	. .	. .	9	. .	9
Other	1	. .	1	. .	1	. .	. .	. .	. .	3	. .	3
Total	23	6	3	1	7	. .	2	. .	. .	35	7	42
Bills, First Reading Only												
Governor-in-Council	20	1	3	1	4	1	5	. .	. .	32	3	35
Minister (incl. Treas. Board)	4	. .	3	. .	1	1	3	. .	. .	11	1	12
Government body	8[e]	1	1	. .	1	. .	. .	. .	. .	10	1	11
Other	1	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	1
Unstated	1	. .	. .	. .	1	. .	. .	. .	. .	2	. .	2
Total	34	2	7	1	7	2	8	. .	. .	56	5	61

[a] Although the same generality of power may have been delegated more than once to the same individual recipient in a given Bill, it is included in the Table only once.

[b] These powers are likely subjective. The column is included to show the contrast with the corresponding column of Table 5.

[c] Includes six delegations of authority, presumably to courts, to impose penalties.

[d] Includes three delegations of authority, presumably to courts, to impose penalties.

[e] Includes six delegations of authority, presumably to courts, to impose penalties.

This is shown in Table 18.

TABLE 18

DELEGATIONS TO TYPES OF RECIPIENTS
(1967-68 COMPARED WITH 1969-70 STATUTES)

Type of Recipient	1967-68 Statutes-in-Force		1969-70 Statutes	
	No. of Delegations	Per cent of Total	No. of Delegations	Per cent of Total
Governor-in-Council	687	73	81	59
Minister (incl. Treas. Board)	123	13	44	32
Other agencies	128	14	13	9
Total	938	100	138	100

The increased delegation to ministers is partly explained by the fact that seventeen of the forty-four delegations were made to the Minister of Finance under amendments to four financial companies Acts.[14] This shift in emphasis should not, therefore, be assumed to be a trend.

In 1969-70, there was a marked decrease in the delegation of authority "to carry out the provisions of the Act," and an increase in the delegation of power to make specific regulations. Table 19 shows the changed pattern of delegation in terms of generality.

2. Provisions for Control

Twenty bills on the 1969-70 order paper, all but one of which were Government measures, contained specific provisions to facilitate Parliamentary control of subordinate legislation. These provisions are summarized in Table 20.

TABLE 19

GENERALITY OF DELEGATION (1967-68 COMPARED WITH 1969-70 STATUTES)

Generality of Delegation	1967-68 Statutes-in-Force		1969-70 Statutes	
	No. of Delegations	Per Cent of Total	No. of Delegations	Per Cent of Total
Specified regulation	377	40	86	62
Specified purpose	142	15	16	12
Specified subject	136	15	27	20
Carry out Act's provisions	283	30	9	6
Total	938	100	138	100

(a) Requirement to publish

Because the Regulations Act required the publication of regulations in the Canada Gazette within thirty days of their making, the mention of tabling in individual bills was redundant unless a different requirement was desired or unless the subordinate legislation to be published was not a "regulation" as defined by the Regulations Act.

Of the twelve bills which became law, the publication provisions in only the Canada-Sweden Supplementary Income Tax Agreement Bill (c. 13, s. 3) and the Arctic Waters Pollution Bill (c. 47, s. 11[2]) appear to have been redundant. In four other bills, the required publication of notices of the issuance of letters patent incorporating companies would probably not have been covered by the Regulations Act.[15] Four others specified the publication of proposed regulations or orders.[16] A notice

TABLE 20

FREQUENCY OF CONTROL PROVISIONS (1969-70)

Control Provision	Number of Bills		
	Becoming Law	Beyond 1r[a]	1r Only
Publish	12	3	1[b]
Table	2[c]	2	. .
Publish and table	. .	. .	1
Annulment resolution	. .	. .	. .
Affirmative resolution	. .[d]	. .	. .

[a] One bill contained a publishing requirement for one section and a tabling requirement for another section. Both are included in the Table.

[b] The sole private member's bill.

[c] One of these contained two different tabling requirements.

[d] The amendment to the National Energy Board Act (c. 65, s. 2) permitted the Governor-in-Council to remove Board members, and the amendments to the Yukon Act and Northwest Territories Act (c. 69, ss. 11, 22) authorized him to remove territorial judges, both upon address by the two houses of Parliament. Such an address must precede the removal, but it is analogous to an affirmative resolution.

of intent to expropriate must under the Expropriation Act (c. 41, s. 6[1]) be published not only in the Canada Gazette but also in at least one issue of a local paper. A copy of the notice must also be sent to persons who have an interest in the property to be expropriated, so that objections might be raised. Finally, water quality management plans must, under the Canada Water Bill (c. 52, s. 13[2]), appear in the Canada Gazette, and for four weeks in a local newspaper, before receiving ministerial approval.

The publication required by none of the three bills which went beyond first reading duplicated the Regulations Act;[17] that required by the Motor Vehicle Inspection (Safety Standards) Bill, which received only first reading, was superflous (C-108, s. 13).

(b) Requirement to table

The Regulations Act required the laying of regulations before Parliament within fifteen days after publication or, if Parliament were not then in session, within the first fifteen days of the next session.

None of the three tabling provisions in the two bills which were given the Royal Assent was redundant. Tabling under the Shipping Conferences Exemption Bill (c. 72, s. 14[2]) was required fifteen days after a proclamation was made. Because the proclamation would have to be published under the Regulations Act, publishing and tabling would presumably occur simultaneously. The first tabling provision in the Nuclear Liability Bill (c. 67, s. 16[2]) required the tabling of agreements within fifteen days of their making; the second tabling section (s. 29[2]) required the tabling of regulations "forthwith" after they were made or, if Parliament were not then in session, within the first fifteen days of the next session.

The tabling specified by the two Government bills which did not become law was to occur, in the case of the Canada Grain Bill (C-196, s. 15[6]), within fifteen days after regulations were made or after the beginning of the next session; and in the case of the Federal Court Bill (C-192, s. 46[4]), within the first ten days of the session next after regulations were made.

(c) Requirement to publish and table

Only the Tax Review Board Bill (C-216, s. 11[2]), which stopped at first reading, combined publishing and tabling. Rules of the Board would not be effective until published in the Canada Gazette, and they would have to be laid before Parliament within fifteen days of their making or of the beginning of the next session. Because publication would be required under the terms of the Regulations Act, that action and tabling would occur at the same time.

(d) Provision for annulment resolution

None of the 1969-70 bills provided for this method of control.

(e) Requirement of affirmative resolution

Although none of the bills which appeared during the session included this provision, an amending bill (c. 6, ss. 1, 2) clarified in two respects the requirement already contained in the parent Customs Tariff Act. First, if the 180-day maximum life of a cabinet order under Sections 1 or 7 expired while Parliament was not actually sitting, Parliament could now still affirm an extension if it acted before "the fifteenth day next thereafter that Parliament is sitting." Second, the required affirmation of an extension was changed from "approval by Parliament" to "resolution adopted by both Houses of Parliament."[18] The reason for the second change was to make clear the type of action needed. "It is my understanding," said J. Loomer of the Department of Finance, "that 'approval by Parliament' means approval in the form of an Act of Parliament, rather than in the form of a resolution adopted by both houses."[19]

B. The Nature of Parliament's Concern

How much discussion was there of the delegation of power, and the adequacy of opportunities to hold accountable the recipients of this authority? No member of Parliament whitewashed the existing situation, nor did anyone criticize the tenor of the conclusions of the House of Commons Special Committee on Statutory Instruments. Indeed, that Committee became virtually a "motherhood" symbol. A detailed account of the session's debate as it related to subordinate legislation and its control is contained in Appendix E.[20]

The Tables in this section are based upon the information recorded in Appendix E, and they are helpful in drawing several conclusions. It is important to recognize, however, that there has of necessity been some approximation in arriving at the specific numbers. While much care was exercised in combing the material upon which the Chapter and Appendix were written,[21] the writer makes no claim that all pertinent references to subordinate legislation and its control have been found and acknowledged.

1. Members Participating

Which members expressed the greatest interest in the matter of subordinate legislation? Appendix F shows that 116 people made a total of 367 comments--an average of about three remarks for each of one-quarter of all our parliamentarians. However, the Appendix makes no distinction between a brief remark and a longer speech made on the same topic, in spite of the probability that the latter represents a greater degree of concern. Tables 21-25 summarize some of the information contained in Appendix F. Table 21 indicates comments by party.

Some caution is required in interpreting the "critical-support-neutral" classification. For example, some of the urging by Government

TABLE 21

FREQUENCY OF COMMENTS, BY PARTY (1969-70)

Party	Critical of Gov't. or Urging Gov't. Action	Support Gov't. Action or Proposed Action	Neutral	Total
House of Commons				
Liberal				
Minister	. .	38	2	40
Parl. Sec'y.	5	8	. .	13
Backbencher	13	7	6	26
Total Liberal	18	53	8	79
Conservative	112	7	10	129
N. D. P.	49	4	9	62
R. Cred.	3	. .	1	4
Total H. of C.	182	64	28	274
Senate				
Liberal	21	16	20	57
Conservative	22	9	5	36
Total Senate	43	25	25	93
Total Parl't.	225	89	53	367

supporters, especially parliamentary secretaries, may in fact have been Government proposals in disguise rather than criticisms of Government.[22] Also, a few "critical" remarks were efforts by opposition members to increase delegation. Further, several "support" comments made by the opposition were in response to Government proposals either to limit delegation or to strengthen control measures in particular bills. Some of the "neutral" remarks may have been veiled criticism or support of the Government. In February, 1970, Senator Martin moved that the Standing Senate Committee on Legal and Constitutional Affairs study and make recommendations for Senate review of subordinate legislation.[23] Comments which, during the debate of that motion, expressed the need for a scrutiny committee are shown in the table as "support" because of Martin's position in the ministry. However, all of these caveats do not obscure the fact that the great majority of comments were critical of the status quo or of Government proposals (225 as against 89 "support" and 53 "neutral" remarks).

Although Liberal backbenchers expressed little interest in the question of subordinate legislation, it is significant that half of their remarks were critical of the Government. At first glance, Liberal Senators appear to have been less constrained by party discipline than were their Commons colleagues; however, when the cabinet (i.e. the Government itself) and their parliamentary secretaries are removed from the calculation, the proportion of Liberal comments which were of a critical nature in the House of Commons is greater (13/26) than that in the Senate (21/57). It is not surprising that most of the remarks made by opposition members in both houses criticized the Government.

Although one-quarter of the members of Parliament showed some interest in subordinate legislation, only about one-third of these (less than ten per cent of all members) spoke more than twice. Tables 22 and 23 summarize the frequencies of participation.

The distribution of comments which criticized the status quo or Government proposals demonstrates that relatively few members struggled for change. This is shown in Tables 24 and 25. Of the seventy-eight members who appear in these two Tables, only eighteen from the Commons and four from the Senate made more than two critical remarks.[24] During the debate of Senator Martin's motion noted above, Senator John Connolly had suggested that there might be times when the House of Commons, because of the lack of continuity from Parliament to Parliament, would have insufficient interest to maintain a viable scrutiny committee.[25] On the basis of these Tables it would appear that he should be equally concerned about the Senate's interest.

TABLE 22

NUMBER OF COMMENTS PER MEMBER, HOUSE OF COMMONS (1969-70)

Comments per member	Number of Members, by Party						
	Liberal			Cons.	N.D.P.	R. Cred.	Total
	Min.	Parl. Sec'y.	Back-bencher				
1-2	7	4	20	16	7	2	56
3-4	2	4	1	6	6	. .	17
5-6	2	. .	. .	4	1	. .	7
7-8	. .	. .	. .	1	2	. .	3
9-10	. .	. .	. .	. .	1	. .	1
11-12	1	. .	. .	. .	. .	. .	1
13-14	. .	. .	. .	1	. .	. .	1
15 plus	. .	. .	. .	1	. .	. .	1

TABLE 23

NUMBER OF COMMENTS PER MEMBER, SENATE (1969-70)

Comments per member	Number of members, by Party		
	Liberal	Cons.	Total
1-2	11	6	17
3-4	4	2	6
5-6	1	. .	1
7-8	2	1	3
9-10	1	. .	1
11-12	. .	1	1

TABLE 24

NUMBER OF CRITICAL COMMENTS PER MEMBER, HOUSE OF COMMONS (1969-70)

Critical Comments per member	Number of Members, by Party						
	Liberal			Cons.	N.D.P.	R. Cred.	Total
	Min.	Parl. Sec'y.	Back-bencher				
1-2	. .	1	10	16	10	2	39
3-4	. .	1	. .	4	3	. .	8
5-6	. .	. .	. .	3	3	. .	6
7-8	. .	. .	. .	1	1	. .	2
9-10	. .	. .	. .	1	. .	. .	1
11 plus	. .	. .	. .	1	. .	. .	1
Total	. .	2	10	26	17	2	57

TABLE 25

NUMBER OF CRITICAL COMMENTS PER MEMBER, SENATE (1969-70)

Critical Comments per member	Number of Members, by Party		
	Liberal	Cons.	Total
1-2	12	5	17
3-4	. .	2	2
5-6	1	. .	1
7-8	. .	. .	. .
9-10	. .	1	1
Total	13	8	21

The members who expressed the greatest interest in subordinate legislation were Baldwin (forty-two comments), Marcel Lambert (thirteen comments), Turner (twelve comments), Brewin (nine comments), and Senators Grosart (twelve comments) and Martin (ten comments).

Almost half of Baldwin's remarks consisted of repeated attempts, mainly during second reading debates and by means of question time, to secure a Government commitment to implement the report of the Statutory Instruments Committee. For example, early in the session he was asking if the Government intended "to move shortly" on the recommendations. By June, however, he wanted to know "why the Government is afraid to implement the Committee's proposals which impose such a wholesome restraint upon excessive and dictatorial government authority."[26] He became "confident that we shall reach the end of the session without action being taken," and that the recommendations "will go down the drain."[27]

His other main theme was criticism, notably during second reading debates, of the amounts of authority for which the Government asked. His tone was initially mild, as when he suggested during debate of the Excise Tax Bill that the delegation of power was "rather wide," and that the minister "look at this question before we come to" the committee stage.[28] However, he later condemned the Government as "greedy, avaricious, grasping for power, secretive, incapable of producing the free and open society that we must have."[29] Baldwin expressed little interest in specific control devices.

Marcel Lambert divided his comments fairly evenly among the second reading and committee stages of bills, and the estimates. He was especially critical of vague and excessive delegation, and of "ministerial discretion piled on the ministerial discretion."[30]

The only Liberal in the Commons who showed much interest was Justice Minister Turner. Half of his remarks were statements that the Government intended to act as soon as possible upon the recommendations of the Statutory Instruments Committee. The recording of only twelve comments is somewhat misleading, however, inasmuch as on three occasions he spent considerable time placing the area of statutory instruments within the broader framework of citizen protection vis-à-vis the government.[31]

Judging from his performance throughout the session, and from his remarks made to the Statutory Instruments Committee the previous session, Turner was clearly enthusiastic about the Committee's recommendations. A later statement of his is entirely believable: "I deeply share the concern" of members "relating to the increase of legislative powers being given to the executive without any realistic form of parliamentary control."[32] One wonders if Turner might have encountered difficulty persuading his cabinet colleagues to accept the recommendations. Indeed, in response to this suggestion from Baldwin during debate of the Statutory Instruments Bill the following year, the Minister replied:

> He is only too right. As a matter of fact, I am sure the only reason the bill is in its present form is the fact [that] some of my colleagues and some of the departments have not fully appreciated what is in the bill. Certainly I have received better treatment in Parliament than I received in back corridor efforts to get this bill on the floor of the House.[33]

Leading the New Democratic Party, but trailing the three men already noted, were Brewin, Barnett, and Burton. Brewin and Barnett spoke mainly during the committee stages of bills, and their main subjects were the Statutory Instruments Committee and specific delegations. Burton spread his use of the question period evenly over several specific topics.

In the upper House, Senators Grosart and Martin made the most comments. Half of Grosart's remarks were criticisms that regulations were not available when bills were debated in Parliament, and that the Government requested too much delegated authority. He said, for example:

> If we pass this [Radiation Emitting Devices] bill as it stands we are saying to the officials: "You decide what the substance of this Bill is, we will pass it and you tell us some time later what we passed."
>
> . . . .
>
> I should like to see it become a principle in this chamber that . . . we will [illegible] grant this wide authority at any time unless we see the regulations.[34]

Grosart spoke almost exclusively during second reading debates and the debate of Senator Martin's motion. Senator Martin naturally focused his attention on this motion, and during the debate he touched upon several subjects.

During the session, how active were the members of the former Statutory Instruments Committee? Table 26 indicates the apparent apathy of all except Baldwin and, perhaps, Brewin.

TABLE 26

COMMENTS BY STATUTORY INSTRUMENTS COMMITTEE MEMBERS DURING THE 1969-70 SESSION

Member	Party	Number of Comments
Forest	Lib.	2
Gibson	Lib.	. .
Hogarth	Lib.	. .
MacGuigan	Lib.	3
Marceau	Lib.	. .
Murphy	Lib.	2
Stafford	Lib.	1
Baldwin	Cons.	42
McCleave	Cons.	6
Muir, R.	Cons.	. .
Brewin	N.D.P.	9
Tétrault	R. Cred.	. .

2. Debate Opportunities Used

Comments made during the session have been classified according to the debate opportunities listed in Tables 27 and 28. No remarks relevant to this study were made during the House of Commons budget debate or Senate consideration of any committee report.

The three opportunities used most often in the Commons were the second reading and committee stages of bills, and the question period. This is to be expected inasmuch as enabling clauses are direct challenges to critics of subordinate legislation, and question time is frequently used to express criticism of, or to embarrass, the Government. It is surprising, however, that although there must be many issues which members wish to raise, the ten o'clock adjournment was used so little to discuss the question of subordinate legislation.[35]

As might be expected, senators used the debate of the Honourable Paul Martin's motion more than any other opportunity. Otherwise, the consideration of bills stimulated the most comment.

One wonders if the heavy use made of the House of Commons committee stage of bills, and to a lesser extent the committee examination of the estimates, was the product of the new committee system.[36] Although procedure in Committee of the Whole House is not as formal as when the Speaker is in the chair, there is less opportunity than in the smaller standing committees for members to pursue matters of interest. On the other hand, a person who wishes to ask questions may not be a member of the appropriate committee. He may, nevertheless, attend and participate in the discussion.

TABLE 27

DISTRIBUTION OF COMMENTS IN HOUSE OF COMMONS, BY DEBATE OPPORTUNITY AND PARTY (1969-70)

Debate Opportunity	Liberal			Cons.	N.D.P.	R. Cred.	Total
	Min.	Parl. Sec'y.	Back-bencher				
Bill							
Second reading	11	3	1	46	11	1	73
Committee	18	6	11	28	20	. .	83
Report	. .	. .	. .	2	2	. .	4
Third Reading	. .	. .	. .	6	. .	. .	6
Throne speech	. .	. .	1	1	. .	. .	2
Oral questions	4	. .	. .	17	15	1	37
Questions on order paper	. .	. .	. .	. .	1	. .	1
Standing Order 26	. .	. .	1	. .	. .	. .	1
Standing Order 43	. .	. .	. .	3	. .	. .	3
Motions for papers	. .	4	. .	3	4	. .	11
Resolutions	. .	. .	4	2	1	1	8
Allotted days	. .	. .	. .	3	. .	. .	3
Ten o'clock adjournment	. .	. .	. .	1	. .	. .	1
Estimates	1	. .	3	7	3	. .	14
Other committee studies	. .	. .	5	5	3	. .	13
Other	2	. .	. .	5	2	1	10
Total	36	13	26	129	62	4	270

TABLE 28

DISTRIBUTION OF COMMENTS IN SENATE, BY DEBATE OPPORTUNITY AND PARTY (1969-70)

Debate Opportunity	Liberal[a]	Cons.	Total
Bill			
Second reading	9	19	28
Committee	10[b]	4	14
Third reading	1	. .	1
Throne speech	. .	1	1
Statutory instruments study (Senate debate)	31	10	41
Statutory instruments study (Committee discussion)	5[c]	2	7
Estimates	4	. .	4
Other	1	. .	1
Total	61	36	97

[a] Including Independent Liberal.

[b] Includes two comments by Hon. J. J. Greene.

[c] Includes two comments by Hon. John Turner.

3. Topics of Debate

Comments have also been classified according to the subjects listed in Tables 29 and 30.

(a) Most frequent

The most popular topic in the House of Commons was the extent of authority which the Government asked Parliament to delegate either in specific bills or generally. These forty-nine comments (mostly critical) represented 18.2 per cent of all remarks, as compared with 9.3 per cent (nine comments) in the Senate. Close behind were the forty-one references to the Statutory Instruments Committee, most of which were likely de facto references to control generally and to the

TABLE 29

DISTRIBUTION OF COMMENTS IN HOUSE OF COMMONS,
BY SUBJECT AND PARTY (1969-70)

Subject	Liberal						
	Min.	Parl. Sec'y.	Backbencher	Cons.	N.D.P.	R. Cred.	Total
Statutory Instruments Committee	12	. .	2	22	4	1	41
Regulations accompanying bills	3	1	2	5	8	. .	19
Regulations known as soon as possible	. .	. .	. .	2	7	. .	9
Government secrecy	. .	4	. .	3	5	. .	12
Amount of delegated authority	3	. .	5	32	8	1	49
Control techniques							
Publish or publicize	2	1	1	5	3	. .	12
Table	1	. .	2	6	3	. .	12
Regulations to committees	3	. .	. .	2	3	. .	8
Annulment resolution	1	. .	. .	. .	. .	. .	1
Affirmative resolution	. .	. .	. .	2	. .	. .	2
Need for scrutiny committee	. .	. .	. .	1	. .	. .	1
Control, generally	. .	. .	1	4	. .	. .	5
Characteristics of delegated authority							
Recipient	1	. .	1	2	. .	. .	4
Subdelegation	. .	. .	. .	. .	1	. .	1
Levy charge payable to public body	. .	. .	. .	1	. .	. .	1
Impose charge on public rev.	. .	. .	. .	3	. .	. .	3
Amend parent Act	1	1	. .	6	2	. .	10
Exclude judicial review	1	. .	. .	. .	. .	. .	1
Generality of delegation	. .	. .	. .	1	1	. .	2
A specific delegation	2	1	7	15	6	. .	31
Reference to Senate study of statutory instruments	. .	. .	. .	2	. .	. .	2
Permissive "may"	1	1	1	2	3	. .	8
Ombudsman	2	. .	1	2	1	1	7
Civil Service domination	. .	. .	. .	1	. .	. .	1
Consult with interest groups	1	3	. .	7	4	1	16
Accountability of gov't. agencies (incl. Crown Corporations)	. .	. .	3	1	1	. .	5
Other	2	1	. .	2	2	. .	7
Total	36	13	26	129	62	4	270

TABLE 30

DISTRIBUTION OF COMMENTS IN SENATE, BY SUBJECT AND PARTY (1969-70)

Subject	Party		Total
	Liberal[a]	Cons.	
Statutory Instruments Committee	8	. .	8
Regulations accompanying bills	2	4	6
Regulations known as soon as possible	. .	1	1
Amount of delegated authority	4	5	9
Control techniques			
Publish or publicize	. .	1	1
Regulations to committees	. .	1	1
Affirmative resolution	1	. .	1
Need for scrutiny committee	13[b]	4	17
Characteristics of delegated authority			
Imposition of penalty	2	. .	2
Levy charge payable to public body	. .	2	2
Amend parent Act	2	2	4
Exclude judicial review	1	. .	1
Generality of delegation	1	2	3
A specific delegation	3	4	7
Reference to Senate study of statutory instruments	8	5	13
Ombudsman	2[c]	1	3
Civil service domination	3	1	4
Consult with interest groups	5	. .	5
Accountability of gov't agencies (incl. Crown Corporations)	5[d]	2	7
Other	1	1	2
Total	61	36	97

[a] Including Independent Liberal.

[b] Including 1 by Hon. J. J. Greene and 1 by Hon. John Turner.

[c] Including 1 by Hon. John Turner.

[d] Including 1 by Hon. J. J. Greene.

need for a scrutiny committee in particular. In third place were the thirty-six remarks related to particular control techniques. The relatively large number of comments made in respect of specific delegations is to be expected.

The two most common topics in the Senate were directly related to Senator Martin's motion and to the resulting discussion in the Committee on Legal and Constitutional Affairs.

It is noteworthy that the Senate demonstrated the greater interest both in specific control techniques (20.6 per cent of the total number of remarks as compared with 13.3 per cent in the House of Commons) and in the characteristics of delegated authority (12.4 per cent as compared with 8.1 per cent). However, it must be acknowledged that the seventeen comments made in the Senate about a scrutiny committee came during the debate of Senator Martin's motion and the subsequent Committee study. It seems doubtful that most of these remarks would otherwise have been made.

There was no debate in the House of Commons of regulations tabled under Standing Order 41. The reason might have been either (or indeed both) that members were unconcerned or that the tabling procedure is not in itself assurance that members are made aware of regulations. Seldom did a minister or parliamentary secretary state that he proposed to lay regulations on the table. The Senate Debates indicated when documents were tabled, but there was no discussion during the session.

Although the referral of regulations to committees was proposed on several occasions in both houses, at no time was this carried out.

(b) Bills with characteristics noted early in this Chapter[37]

How many of the sixty-one bills which delegated authority and were debated (that is, which proceeded beyond first reading), caused discussion pertaining to the characteristics noted in the first part of this Chapter? This information is shown in Table 31. Evidently, members of Parliament did not think these characteristics were critical when the bills containing them were being discussed.

4. Topics of Debate Related to Debate Opportunities

Table 32 combines the topics of discussion with the opportunities used to raise them. The Table explains, for example, that some subjects were mentioned only or mainly at certain times. For example, Government secrecy was considered almost exclusively during the debates of two motions for papers which related to that topic; and the concept of an ombudsman was discussed in the House of Commons mainly during the debates of Mr. Thompson's two bills. The importance of the second reading and committee stages of bills has already been noted; this Table indicates that several topics were considered mainly on these occasions.

On the other hand, the Table shows that references to the amount of delegated authority were spread over several debate opportunities, as were comments about the Statutory Instruments Committee.

C. Conclusion

How interested was Parliament in the question of subordinate legislation? In the House of Commons it is evident, and not surprising, that one must look to the two major opposition parties for expressions of concern. There was less difference between parties in the Senate, although Liberals made more non-critical comments than did

TABLE 31

DISCUSSION OF CERTAIN CHARACTERISTICS OF BILLS (1969-70)

Characteristic	No. of bills with characteristic	No. of bills discussed		No. of comments	
		H. of C.	Sen.	H. of C.	Sen.
Recipient of authority	61	1[a]	. .	4	. .
Subdelegation	6	1	. .	1	. .
Retroactive regulations	1	. .	. .	. .	. .
Impose penalties	9	. .	. .	. .	. .
Levy charge payable to public body	9	1[b]	1	1	2
Impose charge on public revenue	18	1	. .	3	. .
Regulations which conflict with Acts	1	. .	. .	. .	. .
Amend parent Act	42	4	1	7	4
Exclude judicial review	2	. .[c]	1	. .	1
Generality of delegated authority	61	2	. .	2	. .
Publication of regulations	15	4	. .	6	. .
Tabling of regulations	4	2	. .	3	. .
Provision for annulment resolution	. .	1[d]	. .	1	. .
Require affirmative resolution	. .	2[e]	. .	2	. .
Total		19	3	30	7

[a] Comments on bills which permitted the recipient to be designated by the Governor-in-Council are included under "amend parent Act."

[b] The Excise Tax Bill, which permitted the cabinet to make de facto changes in a tax.

[c] The Minister of Justice noted during consideration of the Federal Court Bill that one of the Bill's purposes was to repeal exclusion clauses.

[d] The Minister of Agriculture noted that Parliament could generate an annulment resolution even though the Grain Bill did not contain such a provision.

[e] A proposed amendment to require affirmative resolution under the Grain Bill was withdrawn. This requirement was also suggested informally for exemptions made under the Farm Products Marketing Agencies Bill.

TABLE 32

DISTRIBUTION OF COMMENTS, BY SUBJECT AND DEBATE OPPORTUNITY (1969-70)

Subject	House of Commons																Senate								Total
	Bills				Other												Bills			Other					
	2r	Comm.	Report	3r	Throne Speech	Oral Quest.	Quest. (Order Paper)	S.O. 26	S.O. 43	Motion for Papers	Res.	Allot. Days	Ten P.M. Adj.	Est.	Other Comm. Studies	Other	2r	Comm.	3r	Throne Speech	Sen. Stat. Inst. Study	Comm. Stat. Inst. Study	Est.	Other	
Statutory Instruments Committee	12	1	. .	1	1	10	. .	. .	1	1	. .	1	. .	6	. .	7	1	. .	. .	. .	6	. .	1	. .	49
Regulations accompanying bills	7	11	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	5	1	. .	. .	. .	. .	. .	. .	25
Regs. known as soon as possible	3	. .	. .	. .	. .	5	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	1	. .	. .	. .	. .	. .	. .	. .	10
Government secrecy	2	. .	. .	. .	. .	. .	. .	. .	. .	9	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	12
Amount of delegated authority	19	15	. .	2	1	3	. .	. .	2	. .	. .	1	. .	4	1	1	5	3	1	. .	. .	. .	. .	. .	58
Control techniques																									
Publish or publicize	. .	8	. .	. .	. .	2	. .	. .	. .	. .	. .	. .	. .	1	1	. .	. .	1	. .	. .	. .	. .	. .	. .	13
Table	. .	5	. .	. .	. .	6	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	12
Regulations to committees	. .	5	. .	. .	. .	3	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	9
Annulment resolution	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Affirmative resolution	. .	2	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	3
Need for scrutiny committee	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	3	. .	1	9	4	. .	. .	18
Control, generally	2	. .	. .	1	. .	. .	. .	. .	. .	. .	2	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	5
Char. of delegated authority																									
Recipient	. .	4	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	4
Subdelegation	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Imposition of penalty	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	2	. .	. .	. .	2
Levy charge pay. public body	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	1	. .	. .	. .	. .	. .	. .	3
Impose charge on public rev.	3	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	3
Amend parent Act	4	3	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	2	4	. .	. .	. .	. .	. .	. .	. .	14
Exclude judicial review	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	2
Generality of delegation	1	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	3	. .	. .	. .	5
A specific delegation	10	10	. .	. .	. .	1	. .	1	. .	. .	. .	. .	. .	1	8	. .	3	. .	. .	. .	2	. .	2	. .	38
Senate Statutory Inst. Study	. .	. .	. .	. .	. .	1	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	6	2	. .	. .	3	. .	1	1	15
Permissive "may"	1	7	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	8
Ombudsman	6	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	3	. .	. .	10
Civil Service domination	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	4	. .	. .	. .	5
Accountability of Gov't. Agencies (incl. Crown Corps.)	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	5	. .	. .	. .	. .	. .	. .	. .	. .	. .	7	. .	. .	. .	12
Consult with interest groups	1	6	4	1	. .	4	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	2	. .	. .	3	. .	. .	. .	21
Other	1	1	. .	. .	. .	2	1	. .	. .	. .	. .	. .	. .	1	1	. .	. .	. .	. .	. .	2	. .	. .	. .	9
Total	73	83	4	6	2	37	1	1	3	11	8	3	1	14	13	10	28	14	1	1	41	7	4	1	367

Conservatives. In both houses the second reading and committee stages of bills were the major vehicles (except for the Senate debate of Martin's motion--probably unique to this session).

Of the sixty-one debated bills which contained enabling clauses, fifteen escaped comment about those clauses or about subordinate legislation generally. In view of Kersell's statement that between 1945 and 1957 few such bills escaped scrutiny,[38] we may wonder if members during this session were less interested than in earlier years.

Professor Kunz has suggested that the Senate has been instrumental in reducing the amount or generality of delegated power, or in imposing safeguards against its abuse.[39] Although senators commented about delegation, alluded to past triumphs in curbing delegation or the possibility of its abuse, and urged that the Senate be more insistent in the future in reducing delegation or requiring that proposed regulations be presented with bills, they amended no bills in this direction.[40]

At the beginning of this Chapter the hope was expressed that conclusions drawn from the examination of the 1969-70 session might have general application to other sessions. In retrospect, two qualifications appear to be appropriate. First, the tabling of the Statutory Instruments Committee's report on the last day of the previous session (the day before the second session began) apparently stimulated many comments about control. Second, Senator Martin's February 18 motion calling for a Senate study of statutory instruments, and the debate which stretched over three months, might similarly have stimulated thinking and comments in the upper House.

Subordinate legislation was not a burning issue, generally speaking, during the session. However, how many critics are needed, and how intense must the criticism be, to make improved control techniques worthwhile? Perhaps a scrutiny committee might increase some members' awareness of and interest in the subject.

Footnotes

[1] It will be recalled, however, that the debate of control provisions is only one expression of concern, and that caution must be exercised in drawing conclusions from it. See above, pp. 119-120.

[2] Eighty-one per cent (fifty-one bills) of the sixty-three Government bills, but none of the ten private members' bills, delegated power. In addition, all nine of the Government bills which did not receive the Royal Assent contained enabling provisions.

[3] See below, pp. 175-179.

[4] The proportion which delegated authority solely to the cabinet was 48 per cent (23/48) in 1969-70 as compared with 59 per cent (244/417) in 1967-68. See above, p. 27. The exercise of authority under 4 Acts required the recommendation of a minister or other authority.

[5] The last group includes Bills C-42 and C-51 (Metric System Enquiry Bill) which were identical except for their sponsors.

[6] On the other hand six bills, four of which became law, specified a delay before regulations became effective. One other bill, which did not get beyond first reading, provided that regulations would not be effective until they had been published.

[7] However, the amendment (c. 62, s. 43) to the Excise Act required that the amounts of license fees for the manufacture of wood alcohol be determined by regulation.

[8] Although these rules do not require cabinet or ministerial approval, they were to be laid before Parliament. (S. 46.)

[9] These are in addition to the numerous delegations in the schedules appended to the four appropriation bills.

[10] See above, p. 37.

[11] Northern Inland Waters Act, c. 66, s. 20; Nuclear Liability Act, c. 67, s. 26.

[12] Canada, Parliament, House of Commons, Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence, May 7, 1960, p. 26:22.

[13] See above, pp. 38-42. The delegations contained in the schedules appended to the 1969-70 appropriation bills are excluded.

[14] S. C. 1969-70, cc. 14, 16, 17, 22.

[15] *S. C. 1969-70*, c. 14, s. 2; c. 17, s. 3; c. 22, s. 2; c. 70, s. 33(3). This has been confirmed by J. L. Cross, Assistant Clerk of the Privy Council. (Letter, January 21, 1974.)

[16] *S. C., 1969-70*, c. 30, s. 9; c. 37, s. 11(2); c. 68, s. 4; c. 69, s. 26. The purpose of publishing proposed regulations--made explicit in three of these bills--was to permit interested parties to make representations.

[17] Bills C-192, s. 46(2); C-197, s. 38; C-179, s. 26(2).

[18] See Customs Tariff Act, *R. S. C., 1952*, c. 60, as amended by *S. C., 1963*, c. 18, s. 3, and by *S. C., 1968-69*, c. 10, s. 37(3).

[19] Canada, Parliament, Senate, Standing Committee on Banking, Trade and Commerce, *Proceedings*, December 3, 1969, p. 3:9. See also *H. of C. Debates*, November 20, 1969, p. 1177. Of the three statutes in force in 1967-68 which contained this control measure, the Export Act referred to "resolution," and the Customs Tariff Act and the Library of Parliament Act required the "approval" of Parliament. There had been no discussion of different interpretations.

[20] The table of contents for Appendix E is on p. 293.

[21] Some 26,000 pages of bills and statutes, debates, and committee deliberations.

[22] An obvious exception was an amendment proposed by Cantin during debate of the Expropriation Bill, but opposed by his minister (Mr. Turner). See below, p. 313.

[23] For a discussion of that debate, see below, pp. 354-357.

[24] Although the only remarks of R. Stewart (Lib.) were made during the debate of his resolution to appoint members of Parliament to government agencies, it should be noted that his thirty-seven bills on the Order Paper which were designed to accomplish the same purpose may be interpreted as expressions of concern about parliamentary control over the activities of these bodies. For the motion, see below, p. 340.

[25] *Senate Debates*, April 23, 1970, p. 937.

[26] For his questions and the replies, see Appendix E, n. 193.

[27] See below, p. 323.

[28] See below, p. 316.

[29] See below, p. 341.

[30] For example, see below, pp. 320, 296.

[31] These were during consideration of the Federal Court and Parliamentary Commissioner bills, and when he appeared before the Senate Legal and Constitutional Affairs Committee as it began its study of the question of statutory instruments. See below, pp. 321-322, 331-332, 357-358.

[32] H. of C. Debates, January 25, 1971, p. 2735.

[33] Ibid., March 8, 1971, p. 4065.

[34] See below, p. 295.

[35] Indeed, it has already been pointed out that this opportunity went begging many times during the session. See below, p. 347.

[36] A few bills were considered in Committee of the Whole House, but most of them were sent to standing committees.

[37] See above, pp. 163-179.

[38] Kersell, Parliamentary Supervision, p. 115.

[39] F. A. Kunz, The Modern Senate of Canada, 1925-1963 (Toronto: University of Toronto Press, 1965), pp. 294-304.

[40] The amendment to the Canada Shipping Act (Pilotage) Bill, permitting the cabinet to terminate certain orders before the stated expiry date, appears to have been the only possible exception. See below, pp. 295-296.

CHAPTER VIII

IMPLEMENTATION OF THE STATUTORY INSTRUMENTS COMMITTEE RECOMMENDATIONS

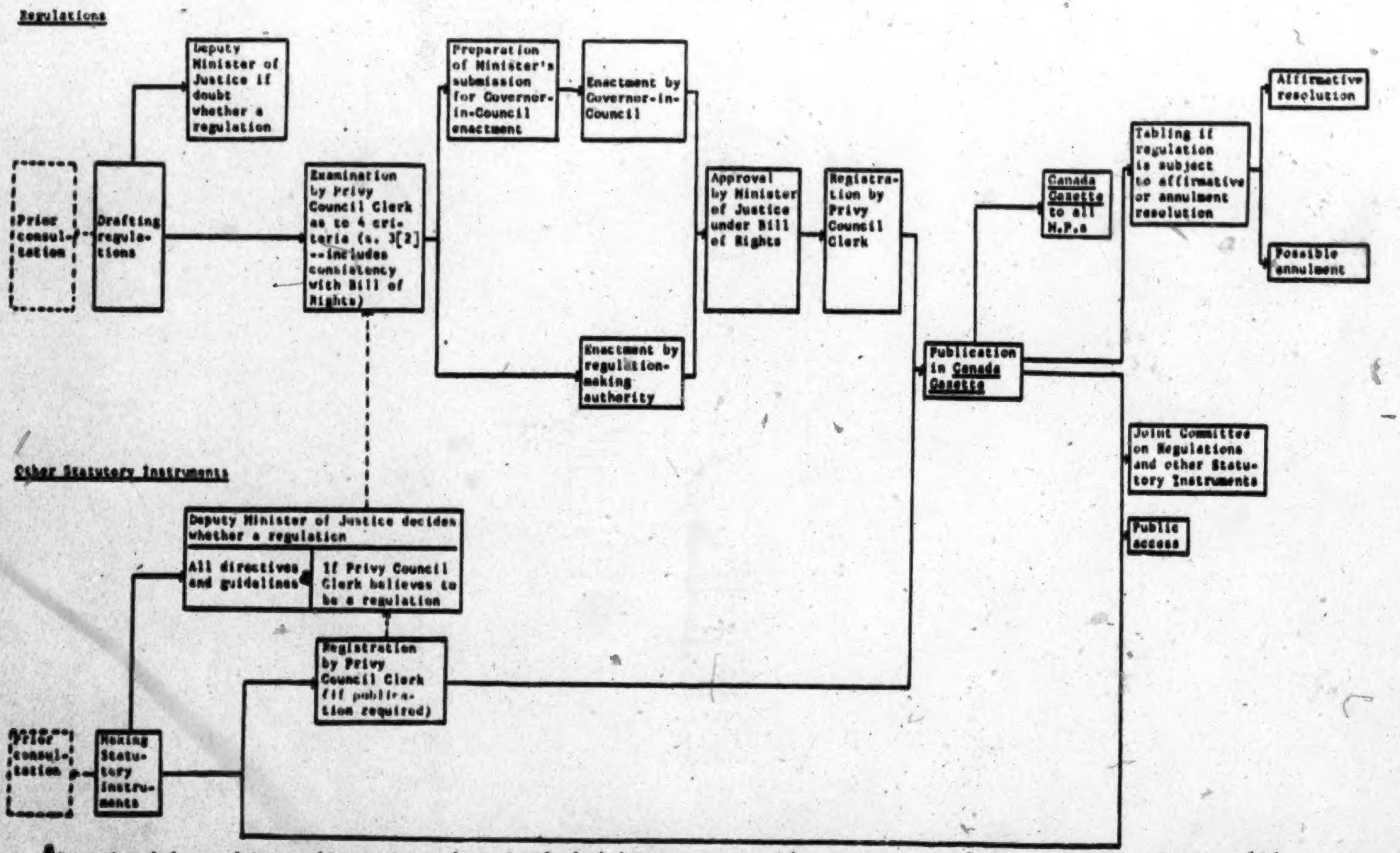
On June 16, 1970, Privy Council President Donald Macdonald gave the first official statement of the Government's intention regarding the eight-month-old recommendations of the Special Committee on Statutory Instruments. It will be recalled that three kinds of action were anticipated to implement the recommendations--new legislation, two cabinet directives, and the establishment of a scrutiny committee.[1] Figure II shows the stages governing the making of regulations and other statutory instruments under this new machinery.

A. The Statutory Instruments Act

The first of these actions took the form of the Statutory Instruments Act. It was given first reading in the House of Commons on November 3, 1970, and Royal Assent the following May 19.[2] Beginning with the definition of "regulation" and "statutory instrument," this Act differs in several significant respects from the Regulations Act. The new legislation introduces to Canadian statutes the term "statutory instrument," and defines it in Section 2(d) as "any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established" (1) in carrying out a power

FIGURE 11

STAGES GOVERNING THE MAKING OF REGULATIONS AND OTHER STATUTORY INSTRUMENTS UNDER THE STATUTORY INSTRUMENTS ACT AND THE BILL OF RIGHTS


Regulations
Prior consultation
Drafting regulations
Deputy Minister of Justice if doubt whether a regulation
Examination by Privy Council Clerk as to 4 criteria (s. 3[2] --includes consistency with Bill of Rights)
Preparation of Minister's submission for Governor-in-Council enactment
Enactment by Governor-in-Council
Enactment by regulation-making authority
Approval by Minister of Justice under Bill of Rights
Registration by Privy Council Clerk
Publication in Canada Gazette
Canada Gazette to all M.P.s
Tabling if regulation is subject to affirmative or annulment resolution
Affirmative resolution
Possible annulment
Joint Committee on Regulations and other Statutory Instruments
Public access
Other Statutory Instruments
Prior consultation
Making Statutory Instruments
Deputy Minister of Justice decides whether a regulation
All directives and guidelines[a]
If Privy Council Clerk believes to be a regulation
Registration by Privy Council Clerk (if publication required)

---

[a] Required by cabinet directive, but included here to provide a more complete picture. See p. 216.

delegated by an Act of Parliament or (2) by the Governor-in-Council in exercising his prerogative powers. Among the four exclusions from this definition (s. 2[d][iii]-[vi]) is "(v) any such instrument . . . whose contents are limited to advice or information intended only for use or assistance in the making of a decision . . . ." This is a significant and unfortunate exclusion if it can be interpreted to include documents, such as the instructions issued to immigration officers, which had concerned the Statutory Instruments Committee.[3]

The definition of "regulation" is broader under the Statutory Instruments Act (s. 2[b]) than it was under the Regulations Act (s. 2[a]). In the first place, the new law describes a regulation as a statutory instrument made in the exercise of a legislative power delegated by Parliament, or an instrument the contravention of which incurs a penalty authorized by statute; the Regulations Act, on the other hand, included only a "rule, order, regulation, by-law or proclamation" made in the exercise of a legislative power or whose contravention was subject to a penalty. Second, the Statutory Instruments Act includes "a rule, order or regulation governing the practice or procedure in any proceedings" before judicial or quasi-judicial bodies; the Regulations Act excluded this.[4] The two statutes are similar, however, in the exclusion of territorial ordinances, orders or decisions of judicial tribunals, instruments of corporations incorporated by the Government of Canada, and use of the Royal prerogative.

The Statutory Instruments Act not only includes more instruments within its purview than did the Regulations Act; it also provides greater control of those instruments. Under the new law, these controls included (1) examination by the Clerk of the Privy Council "in consultation with" the Deputy Minister of Justice, (2) registration by the Clerk of the Privy Council, (3) publication in the Canada Gazette which is distributed to all members of Parliament, (4) referral to a scrutiny committee which "may be established," (5) and accessibility to the public. Under the Regulations Act and its regulations, subordinate legislation had to be examined by the Clerk of the Privy Council "in consultation with" the Deputy Minister of Justice, recorded by the Clerk of the Privy Council, published in the Canada Gazette, and tabled in Parliament.

The Statutory Instruments Act states (s. 3) that a proposed "regulation" must first be submitted for examination by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice to ensure that

> (a) it is authorized by the statute pursuant to which it is to be made;
> (b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;
> (c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the Canadian Bill of Rights; and
> (d) the form and draftsmanship of the proposed regulation are in accordance with established standards.[5]

The regulation-making authority is to be advised of any inconsistency. If an authority is in doubt whether a proposed statutory instrument would be a regulation, a copy of that instrument is to be forwarded to the Deputy Minister of Justice who will make the determination (s. 4).

The regulations under the Regulations Act included only item (d), above, as the criterion for examination; did not specify any action to eliminate an inconsistency; and made no provision for determining in doubtful cases whether an instrument was a "regulation."

In the second place, examined regulations must within seven days of their making be sent to the Clerk of the Privy Council for registration (s. 5[1]). Statutory instruments which are not regulations must be registered if they require publication in the Canada Gazette in accordance with an Act of Parliament or with a cabinet regulation made under Section 27(g) of the Statutory Instruments Act (s. 6). If an unexamined statutory instrument is presented for registration, and the Deputy Minister of Justice has not under Section 4 declared the instrument not to be a regulation, the Clerk of the Privy Council may refuse such registration if in his opinion the instrument is a regulation requiring examination (s. 7[1]). However, the Clerk must forward any such instrument to the Deputy Minister of Justice who will determine its status (s. 7[2]). Although no regulation is invalid because it has not been examined, the Governor-in-Council may upon the recommendation of the Minister of Justice revoke an unexamined regulation (s. 8).

6

The Regulations Act provided that copies of all regulations were to be sent within seven days of their making to the Clerk of the Privy Council for recording, but also that regulations were not invalid if they were not sent or recorded (ss. 3, 4, 5[1]).

A third method of control is the requirement that "regulations" be published in the Canada Gazette (s. 11). In addition, the cabinet may authorize or direct the publication of any other statutory instruments whose publication is, in the opinion of the Clerk of the Privy Council, in the public interest (ss. 12, 27[g]). But the more significant requirement from the point of view of parliamentary control is that all members of Parliament receive copies of the *Canada Gazette* which contain regulations (s. 13[1]).

Under the Regulations Act, regulations were to be published within thirty days of their making (s. 6), and within fifteen days of publication they were to be laid before Parliament (s. 7). However, tabling involved only the depositing of regulations with the Clerk of the House, and neither this action nor the requirement that a record of tabled regulations "be entered in the *Votes and Proceedings* of the same day" did much to attract members' attention. It will be recalled that copies of the *Canada Gazette* were to be delivered to members of Parliament under the terms of the regulations made pursuant to the Regulations Act, but that this was not done.[6]

Both Acts provide that no regulation is invalid because it has not been published. They also state that no person will be found guilty of contravening an unpublished regulation unless (1) publication has been waived by the cabinet or the regulation itself states a pre-publication effective date, *and* (2) "it is proved that at the date of the alleged contravention reasonable steps had been taken to bring the purport of the regulation to the notice of" certain people. There is, however, a significant difference between the two statutes. The Regulations Act required that a regulation be brought to the attention "of the public, or the persons likely to be affected by it, or the person charged" (s. 6[3][b]). The fulfillment of any one of these alternatives, therefore, satisfied the law. Mr. Turner pointed out, however, that the first alternative might not give sufficient protection inasmuch as a notice may not come to the attention of people likely to be affected;

and that the third alternative might often be impossible to satisfy. That is why, he continued, the Statutory Instruments Act requires that a regulation be brought to the attention only of "those persons likely to be affected by it" (s. 11[2][b]). This alternative "brings about a measure of fairness and common sense."[7]

Fourth, "statutory instruments" shall, unless public access is denied under Section 27(d), "stand permanently referred to any Committee of the House of Commons, of the Senate or of both Houses of Parliament that may be established for the purpose of reviewing and scrutinizing statutory instruments" (s. 26). No such committee was envisaged by the Regulations Act.

Fifth, the Statutory Instruments Act guarantees public access to "statutory instruments," "subject to any other Act of Parliament" and to regulations made under Section 27(d) of the Statutory Instruments Act itself (ss. 24-25). The Regulations Act was silent on this matter.

It will have been noted that all five of these control measures embodied in the Statutory Instruments Act apply to "regulations," and that some of them apply also to certain other statutory instruments. Within limits, however, the Governor-in-Council may by regulation make exemptions from any of these control procedures, although the exempting regulation is itself subject to control. Under Section 27(a) the Governor-in-Council may exempt from examination a regulation or class of regulation which is exempted from registration, or which is exempted from publication because it affects only a limited number of people.[8] Under Section 27(b) he may exempt from registration a class of regulation the registration of which is unpractical because of the large number of regulations in that class.[9] Under Section 27(c), and subject to any other Act of Parliament, the Governor-in-Council may exempt from publication (1) a class of regulation which contains a large number of regulations, (2) a regulation which affects or is likely to affect only a limited number of people (if "reasonable steps" have been taken to notify such people of the regulation's existence), or (3) a regulation or class whose publication is not (in the cabinet's opinion) "in the interest of international relations, national defense or security or federal-provincial relations."

Finally, Section 27(d) authorizes the Governor-in-Council to restrict public access to statutory instruments if he deems such access to be not in the interest of international relations, national defense or security, or federal-provincial relations. And he may restrict access to statutory instruments, "the inspection of which or the making of copies of which is not otherwise provided for by law," if he is satisfied that such access would "result or be likely to result in injustice or undue hardship to any person or body affected thereby or in serious and unwarranted detriment to any such person or body in the matter or conduct of his or its affairs." (It was noted above that statutory instruments to which public access is denied are not referred to the scrutiny committee.)

By contrast, Section 9 of the Regulations Act gave the Governor-in-Council unlimited power to exempt regulations from the requirements of transmission to and recording by the Clerk of the Privy Council, of publication, and of tabling. The exempting regulation itself, however, had to be published and tabled.

Whereas the Regulations Act was silent about the effective dates of regulations, the Statutory Instruments Act stipulates (s. 9) that a regulation is not effective before it is registered unless it expressly states an earlier effective date or unless the Governor-in-Council has exempted it from registration. The reason for an earlier effective date must be given to the Clerk of the Privy Council, but in no event can a regulation be made retroactive to a date before it is made.

Although the Statutory Instruments Act contains the potential for greater scrutiny of subordinate legislation than did the Regulations Act, its performance is still to be tested. Some of this scrutiny will occur within the executive branch, but there should also be an increased awareness by members of Parliament of regulations made under the numerous statutes which delegate authority. Replacement of the general tabling requirement by the distribution of the Canada Gazette to all members could contribute significantly to this awareness. Whether it does will depend upon the time devoted to perusal of the Gazette, and upon members' desires to overcome a natural tendency to be more interested in new legislation. Parliament's greatest asset, however, should be the scrutiny committee.

The Statutory Instruments Bill was received by the House of Commons with general enthusiasm, mainly because it anticipated the creation of a scrutiny committee. Section 26 was "the guts of the bill," according to Mr. McCleave.[10] Ironically, the same provision was the source of recurring criticism throughout the Bill's debate. Although the critics were unclear or imprecise in some of their details, the substance of their demand was not--the Bill should specify the powers which the scrutiny committee would possess, especially the power to recommend the approval, amendment, or repeal, of regulations. The Government wanted to leave the question to the rules of the House.

Both Baldwin and Marcel Lambert moved amendments to insert this authority to recommend,[11] although they disagreed as to how recommendations would be implemented. Baldwin would have the committee recommend to the Government, because he did not believe "this House should have the right to vary or repeal regulations." He wanted to know before the Bill was passed "how far the government is prepared to go" in granting powers to the committee. "Standing by itself," he said, Section 26 was "useless."[12]

While agreeing with Baldwin's objective, Mr. Turner, who had introduced the Bill, suggested that the powers of the scrutiny committee should be debated when the House Leader introduced the resolution to establish the committee.[13] He assured the House that

> a resolution amending the Standing Orders with the effect of establishing a scrutiny committee will be presented at this session of Parliament to implement . . . the recommendations of the Special Committee on Statutory Instruments.[14]

Turner also stated that he intended to have the criteria recommended by the Statutory Instruments Committee "set forth in an internal cabinet directive before regulations are made and drafted in order to anticipate the criteria which the scrutiny committee would want to apply to those regulations."[15]

Lambert's amendment would have guaranteed the debate of any scrutiny committee report which recommended "the amendment, replacement or annulment of any statutory instrument," and it provided that such debate "shall continue subject to the Standing Orders of the House of Commons, until the report shall have been finally disposed of." As interpreted by Lambert, this amendment would have permitted the House to act upon committee recommendations.[16] Turner stated that the matter of a guaranteed debate should be left "to the rules of the House and the resolution of the Scrutiny Committee,"[17] although he might have added that the Government was already on record as favouring the "setting aside [of] a certain time on a regular basis for consideration of the reports of the [scrutiny] committee."[18] However, he opposed the powers which Lambert wished to grant to the Commons:

> I do not know how we could transfer from the executive to Parliament, the initiating measure either to pass or revoke [or, presumably, to amend] regulations because of the blurring of responsibility that produces . . . .
>
> We have got to go on the assumption that the government will be properly responsive to scrutiny by a committee of Parliament. If the government is not so responsive, it can leave itself open to a motion of want of confidence in the normal manner.[19]

The main reason for the Minister's concern, however, seemed to be his fear that "the House would be flooded with resolutions to revoke particular regulations, and also [that] there would be uncertainty as to whether any particular regulation was going to be valid until revoked at some future time by a resolution of the House."[20] Apart from the fact that Parliament has the undoubted right to change or annul any regulation if it is determined to do so, Turner's argument has a number of obvious weaknesses. In the first place, Parliament would presumably discuss only those regulations reported to it by the scrutiny committee. Second, there must always be some measure of uncertainty because the authority to which power has been delegated can itself amend regulations--indeed, the need for flexibility is an important reason for delegation in the first place. Third, as Lambert noted, regulations are always subject to annulment by the courts at least on the grounds of vires. And fourth,

> how much more uncertainty would there be if, following the procedure outlined by the minister, a committee brought in an adverse report with regard to one or more statutory instrument? The minister says that a responsible government or a responsible minister would see that there was adverse criticism and would be moved to make the appropriate changes. But until that happened there would be uncertainty in the minds of the public.[21]

Both Baldwin's and Lambert's amendments were defeated.[22]

Fortunately, there was no support for Mr. McIntosh's recommendation that the scrutiny committee "should have the power to take effective action after it has inspected, reviewed and scrutinized."

> It must be strong and free enough to ride close-herd on all recipients of Parliament's delegated authority and to command their compliance and respect. . . . I repeat that to me the essential feature must be that its findings, reports and recommendations carry with them some compulsion on the executive or individual responsible member of the executive, the Prime Minister and cabinet ministers, to take subsequent action.

More specifically, he said that the committee "must be given power to direct the application as intended by Parliament."[23] This is not, however, a power to be placed in the hands of any parliamentary committee.

To the suggestion that the scrutiny committee have power to refer regulations to other standing committees for consideration of their "merit," Turner replied that "this is a question that can be discussed among the chairmen of committees when the scrutiny committee develops influence and prestige in this House."[24]

The question of the scrutiny committee's location was scarcely discussed during debate of the Statutory Instruments Bill, but comments which were made supported a joint Senate-House of Commons committee.[25] It will also be recalled that the Government favoured a joint committee.[26]

Baldwin urged that the chairmanship of the scrutiny committee either rest with the opposition or, "at the very minimum," rotate among the parties.[27] Turner believed that "this is something the party leaders will want to work out."[28]

Although debate in the House of Commons concentrated on the scrutiny committee, there were several references to the exempting power given to the Governor-in-Council by Section 27,[29] several criticisms that the Bill did not include all the recommendations of the Statutory Instruments Committee,[30] and an expression of concern that administrative interpretation could result in some regulations not being "caught" by the new legislation.[31]

The only Liberal to participate in the debate (apart from Turner) was Mr. MacGuigan, who had been the chairman of the Statutory Instruments Committee.[32] The Conservative spokesmen were Baldwin and McCleave (who had served on that Committee), Marcel Lambert, McIntosh, and Diefenbaker. Brewin (a member of the Committee) and Rowland were the New Democratic Party critics. The Social Credit party limited itself to a seven-line statement in support of the Bill.[33]

Although opposition speakers in the House of Commons had criticized the Bill, they were quick to praise much that the Bill contained. During the second reading debate in the Senate, however, the three opposition senators who participated were entirely critical.

Senator Grosart's speech[34] seemed to be predicated on the assumption that the executive, if it were not closely controlled, would deliberately seek ways to evade responsibility. The Senator did note that the Bill was a step, "albeit a halting and hesitant step," toward control of the executive but he severely criticized the breadth of exemptions under Section 27. He doubted that there was much government activity which could not be interpreted as relating to federal-provincial or international relations and which, therefore, could not be excluded from control if the Government desired. While he was critical of the absence of a statutory base for the powers of the proposed scrutiny committee, Senator Grosart acknowledged Turner's promise in the House of Commons that the committee's powers would be dealt with in the Standing Orders. However, he was unimpressed by the Minister's statement that a cabinet directive would restrict the insertion of certain enabling powers into bills.

Senator O'Leary[35] said he agreed with all of Senator Grosart's comments; "it is a bad bill." Senator Flynn was no more enthusiastic.[36]

The only Liberal speaker, apart from Senator Martin who moved second reading, was Senator John Connolly who commented that "the enactment of this measure will be a most useful step forward in controlling delegated legislation."[37]

When Justice Minister Turner appeared before the Senate Standing Committee on Legal and Constitutional Affairs he outlined the Bill's main principles.[38] Several questions were asked (mainly by Senator Grosart) but, surprisingly, there was no significant criticism. The Bill was reported without amendment, and it received third reading after only a short debate on procedure.[39]

The interest shown by Parliament during passage of the Statutory Instruments Bill is encouraging, even though relatively few members participated in the debate. The House of Commons filled fifty-four pages of Hansard; the Senate, twenty-one. In addition, discussion in the Commons Standing Committee on Justice and Legal Affairs ran to twenty-seven pages; in the Standing Senate Committee on Legal and Constitutional Affairs, to fourteen pages. Not only the volume of debate, but also its sophistication, was greater than that on the Regulations Bill. Hopefully, all this indicates a growing awareness of the magnitude and potential dangers of subordinate legislation. It is unlikely that St. Laurent's 1950 suggestion, that cabinet scrutiny of regulations is an adequate substitute for parliamentary review, would have passed unchallenged in 1971.

B. The Cabinet Directives

The two cabinet directives which Mr. Macdonald had promised in June, 1970, were contained in a single document approved by the cabinet on November 10, 1971.[40] Although the document has not been made public, its substance has been clearly stated. First, Justice Minister Otto Lang told the House of Commons that

> the cabinet has directed that all directives or guidelines are to be submitted to the Deputy Minister of Justice, who will advise the issuing authority whether they are in conflict with any provision of the act or the regulations to which they relate, whether they are essentially legislative in nature, whether their subject matter should be incorporated in regulations and, if so, whether there is authority to make such regulations.[41]

Second, the Deputy Minister of Justice has informed this writer that the powers which are not to be conferred on regulation-making authorities without careful deliberation are "substantially" those which the Government had recommended to the Statutory Instruments Committee, plus "power to fix by regulation rather than by the statute itself, the penalties for breach of a prohibitory regulation.[42] Those recommended by the Government are as follows:

> (a) power in a statute or in a regulation made thereunder to exclude the ordinary jurisdiction of the courts;
> (b) power to amend or add to the enabling Act or other Acts by way of regulation;
> (c) power to make regulations having retrospective effect;
> (d) power to subdelegate regulation-making authority;
> (e) power by regulation to impose a charge on the public revenue or on the public other than fees for services;
> (f) power to make regulations which might trespass unduly on personal rights and liberties;
> (g) power to make regulations involving important matters of policy or principle.[43]

These directives should represent a significant improvement in the total machinery controlling subordinate legislation, although their full impact cannot yet be assessed.

C. Establishment of the Scrutiny Committee

On September 7, 1971, the Government gave the following notice of motion:

> That Standing Order 65(3) be amended by adding thereto the following:
>
> "(c) On Regulations and other Statutory Instruments, to act as members on the part of this House on the Joint Committee of both Houses established for the purpose of reviewing and scrutinizing statutory instruments standing permanently referred thereto by section 26 of the Statutory Instruments Act, to consist of 12 members;"
>
> And that a message be sent to the Senate requesting that House to unite with this House for the above purpose, and to select, if the Senate deems it advisable, some of its Members to act on the proposed joint committee.[44]

This motion was approved in a twenty-minute debate on October 14, but no one asked what the committee's powers were to be.[45] The Senate agreed the following week to participate on the new Committee,[46] and both houses appointed their members in March, 1972.[47]

By April, 1974, this much-heralded committee--"the guts" of the Statutory Instruments Act--was just beginning its work, but the criteria to guide its review of statutory instruments had not yet been determined.[48]

D. Conclusion

Although it is too early to assess the new mechanisms, a few observations can be made. With respect to control within the bureaucracy, Mr. Cross comments[49] that the examination of regulations by his office has been "drastically improved." The duties which Mr. Beseau performed almost single-handedly have been assigned to a director and five other lawyers. Since the passage of the Statutory Instruments Act there have been "numerous" inquiries by regulation-making authorities to resolve doubt as to whether certain statutory instruments are regulations. Furthermore, Section 7 of that Act, which authorizes the Clerk of the Privy Council to refuse to register statutory instruments, has "resulted in much greater care being exercised by officials in complying with the requirements of the Act before submitting statutory instruments . . . for registration."

The Deputy Minister of Justice reports that, as a result of the one cabinet directive,

> a review was undertaken by the legal officers of all departments of directives and guidelines issued by those departments.

> I am informed that in the course of this review, the departments removed most guidelines or directives they were advised came within the Cabinet directive, with the result that very few were referred to this department.[50]

Depending upon what is meant by guidelines and directives which "came within the Cabinet directive," it appears that Beseau was correct in his suspicion that a number of documents which had not been submitted for examination were, in fact, of a legislative nature.

This writer has not reviewed recent statutes to determine the immediate effect of the cabinet directive relating to enabling clauses.

To what extent have the recommendations of the Committee on Statutory Instruments been implemented? Appendix G indicates, for each recommendation, the action which has been taken. Clearly, the principle has been accepted that formal scrutiny of statutory instruments by a parliamentary committee is the only practical and systematic way to give members of Parliament the opportunity to react to these instruments. Furthermore, to improve the effectiveness of parliamentary scrutiny, it has been agreed that enabling clauses themselves should meet certain standards, that there should be greater assurance than in the past that all documents of a legislative nature are subject to both executive and legislative review, and that regulations must be more readily accessible.

However, there remains a large gap in the control machinery inasmuch as most of the rules which will govern the operation of the scrutiny committee have not yet been determined. The Government has, nevertheless, stated its support for most of those recommended by the Statutory Instruments Committee, and for an even more inclusive list of scrutiny criteria.[51] It is expected, therefore, that by the time the new Committee begins to review statutory instruments, there will be few recommendations which will not have been adopted. However, only experience will indicate the full extent to which all recommendations have in fact been implemented.

Footnotes

[1] H. of C. Debates, June 16, 1970, pp. 8155-56. See below, p. 353.

[2] Ibid., November 3, 1970, p. 819; May 19, 1971, p. 5980.

[3] See above, pp. 124-125.

[4] Prime Minister St. Laurent gave the following explanation of this exclusion: "They are required to be published otherwise, and are available in a separate booklet from the king's printer . . . . It was felt that they would not be of general interest to the public at large." (H. of C. Debates, June 12, 1950, pp. 3497-98.)

[5] Turner said this was merely giving "a statutory basis" to the review already being done. (Canada, Parliament, Senate, Standing Committee on Legal and Constitutional Affairs, Proceedings, June 17, 1970, p. 6:9.)

[6] See above, Chapter III, n. 10.

[7] H. of C. Debates, March 8, 1971, p. 4050.

[8] Before Section 27 was amended by the Commons Standing Committee on Justice and Legal Affairs, the power to exempt from examination extended also to regulations exempted from publication in the interest of international relations, national defense or security, or federal-provincial relations. (Minutes of Proceedings and Evidence, February 16, 1971, p. 7:21.)

[9] For an example, Turner noted that the number of daily orders for the Armed Forces exceeds 2,500 each week. (H. of C. Debates, January 25, 1971, p. 2735.)

[10] H. of C. Debates, January 25, 1971, p. 2736.

[11] Ibid., March 8, 1971, p. 4060.

[12] Ibid., pp. 4069, 4063, 4062.

[13] Ibid., p. 4067.

[14] Ibid., March 10, 1971, p. 4157. Unfortunately, that resolution made no reference to the committee's powers. (Ibid., September 27, 1971, p. 8191.) The resolution was debated on October 14 (pp. 8679-81), but nobody raised the question.

[15] Ibid., March 10, 1971, p. 4157.

[16] Ibid., March 8, 1971, p. 4069.

[17] Canada, Parliament, House of Commons, Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence, February 16, 1971, p. 7-10.

[18] Statutory Instruments Committee, Minutes (Appendix "J"), October 7, 1969, p. 256.

[19] House of Commons Standing Committee on Justice and Legal Affairs, Minutes, February 16, 1971, p. 7:11. Surely, however, Turner did not really believe that the Government would view this ultimate weapon as a practical threat.

McCleave commented that, because regulations were to be permanently referred to the scrutiny committee, if the Government failed to take a recommended action the committee could, "presumably, . . . report the next week, and so on, if it felt very strongly what it regarded as an injustice in the regulation." (H. of C. Debates, March 8, 1971, p. 4073.)

[20] House of Commons Standing Committee on Justice and Legal Affairs, Minutes, February 16, 1971, p. 7:11.

[21] Marcel Lambert, H. of C. Debates, March 8, 1971, p. 4070.

[22] Ibid., March 10, 1971, pp. 4151-53.

[23] Ibid., January 25, 1971, pp. 2740, 2741, 2742. He was referring specifically to the interpretations given by departmental officials to certain terms which appear in Acts. One might well ask, however, how the intention of Parliament would be determined.

[24] Ibid., March 8, 1971, p. 4067. The suggestion had come from Brewin (p. 2739), Baldwin (p. 4064), and Diefenbaker (p. 4145). It was also a recommendation of the Statutory Instruments committee. (Third Report, p. 93.)

[25] Ibid., January 25 and March 8, 1971, pp. 2737, 4072 (McCleave); p. 2745 (Lambert); p. 4063 (Baldwin). House of Commons Committee on Justice and Legal Affairs, Minutes, February 16, 1971, p. 7:9 (Turner). In the House, Turner said that he disagreed with the Statutory Instruments Committee's recommendation of a Commons committee (p. 4066), and when the Senate Standing Committee on Legal and Constitutional Affairs was considering the new legislation, the Minister of Justice suggested that a Senate scrutiny committee "would be an admirable vehicle." (Proceedings, May 6, 1971, p. 7:9.)

[26] See above, p. 137.

[27] H. of C. Debates, March 8, 1971, p. 4063.

[28] Ibid., p. 4067.

[29] *Ibid.*, January 25, March 8, March 10, 1971, pp. 2739, 4156-57 (Brewin); p. 2745 (Lambert); 4061, 4154 (Baldwin); 4156 (Rowland); 4157 (Turner). House of Commons Committee on Justice and Legal Affairs, *Minutes*, February 16, 1971, p. 7:9.

[30] *H. of C. Debates*, January 25, March 8, March 10, 1971. Lambert called the Bill a "timid, half step." (P. 2744.) Baldwin said it was "but a weak and puny version of the very reasonable and substantial recommendations made by the [Statutory Instruments] committee" (p. 4060), but he added at the close of the debate (p. 4158) that "this statute when passed will constitute a real monument in our dealings and those of the people of Canada with regard to problems caused by the tremendous number of regulations with which ordinary people have to deal."

[31] *Ibid.*, January 25, 1971, p. 2739 (Brewin), pp. 2743-44 (MacGuigan). MacGuigan commented that "if this matter cannot be reached in any other way, I trust that it will be thoroughly and effectively dealt with by the executive directives which we expect will be promulgated by the government."

[32] Apart from the remark quoted in n. 31, his only comment of substance pertained to the powers of a scrutiny committee: "I anticipate that that will be the substance of the changes in the rules which will be proposed by the House leader, when the rules changes are introduced. Naturally, we will all be very interested in the substance of those changes when they are proposed." (*H. of C. Debates*, January 25, 1971, p. 2743.)

[33] Mr. Fortin, *ibid.*, March 1, 1971, p. 4150.

[34] *Senate Debates*, March 24, 1971, pp. 759-764.

[35] *Ibid.*, March 25, 1971, pp. 770-771.

[36] *Ibid.*, April 1, 1971, pp. 820-821.

[37] *Ibid.*, March 18, 1971, p. 733. For Senator Martin's comments, see pp. 730-33.

[38] Canada, Parliament, Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, May 6, 1971, pp. 7:8-14.

[39] *Senate Debates*, May 18, 1971, pp. 994-996; May 19, 1971, pp. 1006-07.

[40] Letter from D. S. Thorson, Deputy Minister of Justice, February 18, 1974.

[41] *H. of C. Debates*, March 22, 1972, p. 1049, in reply to a question by Mr. Hogarth.

[42] Letter from D. S. Thorson, Deputy Minister of Justice, February 18, 1974.

[43] Statutory Instruments Committee, Minutes, (Appendix "J"), October 7, 1969, p. 255.

[44] H. of C. Debates, September 7, 1971, p. 7547.

[45] Ibid., October 14, 1971, pp. 8679-81.

[46] Senate Debates, October 21, 1971, p. 1371.

[47] House of Commons: Allmand, Béchard, Blair, Forest, Gibson, Marceau, Penner, Fairweather, McCleave, Schumacher, Brewin and Laprise (March 22, p. 1039). Senate: Fergusson, Forsey, Goldenberg, Grosart, Haig, Lafond, Molson, and Rowe (March 9, p. 23).

[48] The Committee had met on March 1 and April 11, 1973, and on January 8, 1974. (Canada, Parliament, Joint Standing Committee on Regulations and other Statutory Instruments, Minutes of Proceedings and Evidence.) On January 9, 1974, Senator Forsey, one of the co-chairmen, provided the Senate (Debates, p. 1419) with "a little information about this committee, which honourable senators may have thought was lost, strayed or stolen." There had been "some difficulty" obtaining staff, he reported, but the Committee "is now, I think I may say, operational and has plans for holding hearings on certain matters immediately after the recess which we all expect in a short time."

This writer was told in April, 1974, that the new Committee would consider the question of scrutiny criteria in the near future. (Letter from G. C. Eglington, Clerk of the Committee on Regulations and other Statutory Instruments, April 2, 1974.)

[49] Letter from J. L. Cross, Assistant Clerk of the Privy Council, January 21, 1974.

[50] Letter from D. S. Thorson, Deputy Minister of Justice, February 18, 1974.

[51] Statutory Instruments Committee, Minutes (Appendix "J"), October 7, 1969, pp. 255-256.

CHAPTER IX

CONCLUSION

Subordinate legislation is a fact of modern life, and the delegation of legislative authority to the executive branch of government is not likely to diminish. However, this circumstance does not imply that Parliament should delegate this power indiscriminately. Indeed, delegation should always require justification by those who propose it, and the power so delegated should always be expressed in precise language. The words of Sir Cecil Carr are worth recalling: "In general, if delegation of legislative power is mischievious [sic], the mischief must primarily have been done when the Bill was passed which conferred the power."[1]

However, it must also be acknowledged that the exercise of this power may be mischievous. Because the exercise of any discretionary authority can be abused, most people today who discuss the "problem" of subordinate legislation are concerned not so much with reducing the frequency of delegation as they are with providing safeguards against abuse. If abuse could be defined solely in terms of illegality, judicial review would be a sufficient check. But if Parliament chose to delegate broad powers, especially in subjective terms, or explicitly to exclude judicial review, the safeguard provided by the courts would (to the extent that these legislative techniques were not circumvented by the courts) be seriously curtailed.

It was suggested in Chapter I, however, that abuse is not merely a legal term. The danger of abuse is therefore related not only to the adequacy of judicial control, but also to the extent of the delegation itself, and to the adequacy of executive and legislative control mechanisms.

Members of Parliament demonstrated, during the 1969-70 session, some awareness of the problem of controlling subordinate legislation, but the amount of real concern which they expressed was alarmingly small. Even Baldwin, who appeared to be more concerned than most members, allowed the issue to become a political football while Parliament awaited the Government's response to the recommendations of the Statutory Instruments Committee.

The present Chapter consists of a brief summary of the findings of this study. It also contains specific recommendations for the operation of the Committee on Regulations and other Statutory Instruments, inasmuch as many important decisions relating to this Committee have not yet been made. Because of the central importance, for this study, of parliamentary control, conclusions pertaining to that control (together with the recommendations with respect to the scrutiny committee) are stated in the latter part of the Chapter. The other elements of control are considered first.

A. Extent of Delegation of Power

In the absence of guidelines for the drafting of enabling clauses, enabling legislation itself has, in the past, contributed to the possibility of abuse. The unnecessary variety in terminology, and the lack of precision, have created uncertainty in some instances as to whether the requirements of the Regulations Act should be applied. They have also created difficulty in determining the legal limits of the delegation. The present study suggests that these defects in enabling legislation have resulted generally from the failure by Parliament to appreciate the need for precision, rather than from a desire to broaden the scope of delegated power.

About two-thirds of the Statutes of Canada delegate authority, mostly to the Governor-in-Council. Enabling clauses have a variety of characteristics and a wide range of generality. In spite of the claim that the choice of recipient is carefully made in each instance,[2] it would appear that authority could more often be delegated to individual ministers, thereby expediting the regulation-making process, without sacrificing much control. Cabinet action is preceded by recommendations from the appropriate ministers, and often is necessarily cursory.[3] However, the cabinet should make, confirm, or be able to veto, regulations which have substantial policy implications or which fall within the specific types of delegation described in the following paragraphs.

Although the delegation of authority is necessary in the modern state, there are certain powers which Parliament should delegate only in exceptional circumstances. The Government has now recognized this fact in its list of powers which should not be delegated except after careful consideration.[4] Perhaps the most offensive of these are the power to tax, and the power to spend (except the making of routine payments) from the public revenue. As pointed out in Chapter II, it is a basic principle of our system of government that Parliament must sanction all income received, and all expenditure made, by the executive.[5] Indiscriminate delegation of the powers to tax and spend would seriously weaken attempts by Parliament to enforce this principle. Fortunately, however, this type of delegation has been infrequent.

Authority to make retroactive regulations should also be avoided for the obvious reason that people cannot reasonably be made subject to law of which they are unaware. It will be recalled that the Statutory Instruments Act provides (s. 9) that regulations generally become effective when they are registered--twenty-three days before they must be published. It may be argued that publication should precede the effective date of a regulation, and there is merit in the Statutory Instruments Committee recommendation that individual Acts, or even individual regulations, "should resort more than they do now" to this stipulation.[6] Nevertheless, it is important that there is protection against conviction for violating a regulation which has not been brought to the attention of people likely to be affected by it.[7] It is still left to individual statutes to provide, where necessary, for other means to ensure publicity as well as publication.

Although authority to "amend" a parent Act by means of regulations should be granted only with caution, criticism of such grants is too general if it fails to discriminate among types of "amendment." The least desirable types are the defining of key words which establish the scope of an Act; the making of regulations which govern situations not covered by an Act; the adapting of an Act's provisions; the altering of an Act's application; the suspending, repealing, or deferring the implementation of an Act or parts of it; and the extending of an Act's life beyond its stated expiry date. Some of these types of amendment have been too freely authorized in the past. Less serious, however, are delegations of authority to proclaim an Act in cases where the necessary administrative machinery or regulations are not ready at the time Royal Assent is given; to alter a schedule; and to change the minister responsible.

It is difficult to comment upon the propriety of authority to subdelegate regulation-making power, inasmuch as de facto delegation within departments is taken for granted. However, an Act which explicitly authorizes subdelegation should identify the recipient of that redelegated power. Several statutes do not do this. Delegation of power to impose penalties for violation of regulations is justifiable if the type and maximum of the penalty are stated in the Act, or if guilt is to be established and penalties imposed by courts in accordance with existing law. This practice has not been uniformly adopted.

Although members of Parliament criticized the Government during the 1969-70 session for proposing excessive delegation in certain bills, only once during the present study did this writer find evidence that members were aware of the subtleties of the language of enabling clauses as discussed by Driedger.[8] The exception was the Honourable Donald Macdonald's summary of Driedger's analysis in his submission on behalf of the Government to the Committee on Statutory Instruments.[9] Delegated authority should be as specific as possible. Indeed, a greater proportion (62 per cent) of all delegations in 1969-70 (as compared with 40 per cent in 1967-68) were to make specific regulations. However, 20 per cent of the 1969-70 delegations (compared with 15 per cent in 1967-68) were to make regulations "in relation to" specific subjects.[10]

On the other hand, there was a markedly smaller proportion of delegations of power in 1969-70 "to carry out the provisions of the Act." If authority to make this kind of regulation is interpreted as authorizing only routine procedural regulations, and is therefore unobjectionable, there must be assurance that departments and other agencies do not follow the lead of the Department of Manpower and Immigration and enact more substantial regulations.[11] However, the Privy Council Office and the Department of Justice should now be able, under the Statutory Instruments Act, to provide greater safeguards.[12]

In 1969-70 there was also a smaller proportion of delegations expressed in subjective terms (14 per cent as compared with 24 per cent in 1968). This is most encouraging inasmuch as the propriety of regulations should, wherever possible, be based upon objectively-determined criteria. Delegation in objective terms facilitates not only judicial review but also legislative scrutiny.

B. Control by the Executive

Evidence collected by the Statutory Instruments Committee indicated that executive control of subordinate legislation, especially by the Privy Council Office, was diligent and effective.[13] However, the same evidence pointed to the fact that the legislative basis of this examination--especially the regulations made under the Regulations Act--and the size of staff assigned to the task, were inadequate. The safeguard which Privy Council examination provided against possible abuse was largely the result of the job description as interpreted by the Assistant Clerk of the Privy Council (J. L. Cross) and the Legal

Adviser to the Privy Council Office (Paul Beseau). It will be recalled that Beseau interpreted "form and draftsmanship" to include legality, and to authorize his rejection of regulations which, without explicit statutory provision, subdelegated power or were retroactive. His examination also appeared to anticipate the new obligation created by the Statutory Instruments Act (s. 3[2]) "to ensure that . . . [the regulation] does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made."[14] The improved quality of draftsmanship which Justice Minister Turner hoped to create by means of training seminars should aid Privy Council examination.

Any definition of "regulation" expressed in terms of legislative power requires an interpretation of the word "legislative." The difficulty which this presents has been discussed. Until recently, rule-making authorities themselves gave the interpretation for each instrument, unless on their own initiative they sought the advice of the Privy Council Office. As a result, there was no assurance that all "regulations" as defined by the Regulations Act were subjected to the requirements of that Act and the Bill of Rights. The expanded definition of the term "regulation" contained in the Statutory Instruments Act will, however, result in more instruments of a legislative nature being examined.

Should Parliament delete the "legislative" characteristic from the definition of "regulation," and in so doing submit all statutory instruments to the requirements of the Statutory Instruments Act? Alternatively, should that Act require all statutory instruments to be submitted to the Privy Council Office which would then identify the "regulations"? Either change would ensure that all legislative instruments were made subject to the examination provided for by the Statutory Instruments Act. However, because of the large volume of non-regulation statutory instruments, both alternatives would require a large expansion of the Privy Council Office. In addition, the first alternative would unnecessarily place an intolerable burden on the Canada Gazette. A third possibility would be the adoption of a practice analogous to that in the United Kingdom. Parliament would decide for each enabling clause when a bill is passed, whether the resulting enactments are to be "regulations," other "statutory instruments," or neither. A disadvantage of this procedure is that it could easily spark debates in Parliament relating to appropriate control techniques of potential instruments, and thereby waste valuable time.

It is this writer's view that the new definition of "regulation" contained in the Statutory Instruments Act is sufficiently broad.[15] This view is strengthened by the improved techniques for "catching" regulations. In the first place, the Act requires that authorities submit for interpretation by the Deputy Minister of Justice any proposed statutory instrument which might be a regulation but about which the proposing authority has doubt. The second technique relates to a statutory instrument which must be published under the terms of any other statute or under the terms of regulations made pursuant to Section 27(g) of the Statutory Instruments Act, and which must therefore be registered. The Clerk of the Privy Council may refer to the Deputy Minister of Justice such an instrument which he believes to be a regulation. Third, the cabinet requires the Deputy Minister of Justice to examine all directives and guidelines and to determine whether any are regulations.

An assessment of these control techniques will be possible once sufficient experience with them has been gained. Cross reports that "the mechanics of review of statutory instruments have been drastically improved"; he adds that the duties which Beseau performed "are now assigned to . . . a director, together with five other lawyers."[16] If some instruments of a legislative nature continue to elude examination by the Privy Council Office, then consideration should be given to a requirement that all statutory instruments be submitted to that Office so that "regulations" may be identified.

The fact that the Statutory Instruments Act places limits on the cabinet's authority to exempt statutory instruments from the several control features of the Act is an improvement over the Regulations Act which contained no restriction. While there should be little opposition to exemption from publication in the Canada Gazette when many regulations are involved or when few people are affected (provided that the people affected are informed of the regulations), exemption from Privy Council examination for the same reasons is another matter. There should be assurance that all regulations satisfy the examination criteria.

C. Control by the Judiciary

In Chapter V it was suggested that consideration of the courts' role in controlling delegated power is frustrated by the problem of defining the several types of authority. However, it was also noted that, except in borderline cases, legislative power can be identified without much difficulty.

Judicial review of subordinate legislation has generally been restricted to a determination of whether regulations fall within the scope of the enabling Act, and it appears not to have interfered with "policy" matters. This role of the courts is consistent with this writer's view that the prevention of abuse in the broad sense is largely a function for Parliament to perform. It is consistent, also, with the view that Parliament has the right, within its jurisdiction, to delegate legislative authority as it sees fit. This includes broad grants of power, delegation in subjective terms, and the use of more direct techniques to exclude judicial review of subordinate legislation. Nevertheless, if Parliament is to limit the possibility of abuse, it should use this right sparingly. Review by the courts should seldom be deliberately thwarted.

The present study has raised doubts as to Parliament's interest in controlling enabling clauses, and regulations made pursuant to them. Hopefully, the new techniques being developed will help to overcome this apathy. If, however, they do not, it may be necessary to reconsider the proper role of the courts in the prevention of abuse.

D. The Role of Parliament

Except in the few instances where statutes provided for affirmative or annulment resolutions, the means of legislative control were, before 1971, restricted to the normal debating opportunities in each house. Parliament lacked the machinery for consistent and continuous review of subordinate legislation. Gibbon was quoted in Chapter I as suggesting that this lack of machinery for "ready" control leads to greater interference by the legislature in the exercise of delegated powers.[17] However, Canadian experience, insofar as it can be generalized from the 1969-70 session, does not support this proposition.[18]

Although there is no point repeating in detail the conclusions drawn from the study of the 1969-70 session it will be recalled that, of the one hundred and sixteen members who demonstrated some interest in subordinate legislation, only twenty made references on more than four occasions, and only four members spoke more than ten times. Because that session immediately followed the tabling of the Third Report of the Statutory Instruments Committee, and contained the debate of Senator Martin's motion calling for a Senate study of the problem, it seems likely that many comments were stimulated by these two developments. Indeed, more than one-fifth of all remarks on the subject of subordinate legislation were made during that Senate debate, or were related to the Third Report, or pertained to the establishment of a scrutiny committee which was a focal point of both events. This means that a more typical session, if such an expression may be used, might have produced even less interest than did that of 1969-70. Neither house produced the criticism which Professors Kersell and Kunz had attributed to it a few years earlier. It should also be noted that half of the comments were not demands for improved control techniques, unless those comments should be interpreted as statements of frustration which could best be alleviated by increased control.

Kersell has reported that, during the post-war years until 1957, the Conservative party performed its own review of subordinate legislation. However, no machinery exists today within that party or, indeed, within any opposition party.[19]

In spite of the fact that Parliament displayed a distressing lack of interest in strengthening specific control measures, it may be argued that improved techniques are necessary. A scrutiny committee can be justified not only in terms of the scrutiny function itself, but also as a focal point for concerned members, as a means of increasing interest in the question of subordinate legislation, and as having a salutory effect upon regulation-making authorities. Specific recommendations for a scrutiny committee are made below.[20]

It must also be recognized that a member's silence in Parliament should not be equated with complete apathy, inasmuch as statistics based upon public utterances ignore expressions of concern made in party caucus or directly to members of the Government. This may be particularly significant for members on the Government side of the House of Commons, perhaps especially for those who served on the Statutory Instruments Committee, who would naturally hesitate to criticize the Government publicly.

Given a proclivity for politicians to concentrate on current issues, the lack of attention given to specific regulations is understandable. Other contributing factors are doubtlessly a lack of time and expertise, the empty form of tabling, and the fact that members have not until recently received personal copies of the Canada Gazette containing published regulations. Nevertheless, it is well-known that members receive communications from their constituents seeking redress of grievances, and that members intercede with the appropriate departments. Several such instances were recounted en passant during the 1969-70 session.

Should subordinate legislation be subject to confirmation or annulment by Parliament? While the control which these procedures seem to imply has an initial appeal, further reflection leads to the conclusion that they serve a useful purpose only in exceptional circumstances. In the first place, they contradict some of the basic purposes of delegation. Second, they create uncertainty until the time for parliamentary action has expired, and this period can be lengthy if Parliament has recessed or prorogued when the regulations are made.[21] Third, a scrutiny committee may be unable to review regulations, conduct any necessary discussions with the appropriate authorities, and report to Parliament within the period allowed for legislative action. Fourth, annulment resolutions especially are likely to create confrontation situations and tempt the Government to marshall its voting strength to get its way. Fifth, all-or-nothing votes may frustrate attempts by Parliament to secure improvements in regulations with which it basically agrees. Perhaps, then, little should be added to the Statutory Instruments Committee recommendation that these "more stringent controls should be resorted to when Parliament is enabling subordinate legislation to be made in new areas affecting matters of large consequence to the public."[22]

The Government will always find time for Parliament to consider affirmative resolutions. However, the debate of annulment resolutions must, in the absence of guarantees in the enabling Acts, depend upon the use of private members' time. In view of the many competing demands for this limited time, and the infrequent provision for annulment resolutions, statutes should guarantee that motions to annul will be debated within a specified number of days (such as four). At present, such a guarantee is provided in only one-half of the relevant Acts.

Review of subordinate legislation by a parliamentary committee has several apparent advantages. In the first place, a committee will relieve individual members of Parliament of responsibility to remain _au courant_ with regulations. Second, it will, hopefully, develop prestige and thereby be able to secure changes in obnoxious regulations. Third, there seems to be no practical alternative way to ensure the review by Parliament of all subordinate legislation. Fourth, because most comments in Parliament have not related to individual regulations, it is likely that the hitherto unstructured approach to review has been less effective in influencing the making of new regulations than will be the formal scrutiny of regulations themselves. This assumes, of course, that committee review will keep rule-making authorities on their toes rather than encourage laxity.[23] Finally, it is to be hoped that such a committee will stimulate among more members of Parliament an increased awareness of the need for control.

It is assumed that scrutiny should be performed by a single standing committee rather than by existing subject-matter committees. While the existing committees might be presumed to have developed an expertise in their respective areas, thus making them the logical scrutinizing bodies, there are in this writer's view sufficient arguments to recommend a single committee. In the first place, existing committees are already becoming overloaded with work. Second, it is likely that a specialized committee would generate greater interest, among its members, in the scrutiny function than would a large number of subject-matter committees. Third, scrutiny by several committees would likely produce inconsistency in the reviewing of regulations. Fourth, there would likely be a practical difficulty securing the necessary technical assistance to serve all of the subject-matter committees. Nevertheless, the review procedure suggested below does permit some involvement by existing committees.

For scrutiny to have maximum benefit it should not provoke party confrontation. The Government must be open to suggestions, and the opposition must not seek to embarrass the Government. At first glance, this suggests the Senate as the preferred location. The life of the Government is not threatened by Senate action; senators escape the stricture of party discipline more easily than do their Commons colleagues; the Senate has more time for committee work; and if continuity of committee membership is important, the upper House is more likely than the Commons to provide it. However, consideration of the best location of the committee has become academic in view of Parliament's establishment of the Joint Committee on Regulations and Other Statutory Instruments. An assessment of this joint venture should be made after the Committee has gained experience.

Of greater moment than location are the terms of reference which should govern the Committee's operation. There seems little doubt that the Committee should avoid debating "that policy in a regulation [or other statutory instrument] which is a direct reflection of the guides set forth in the enabling legislation," for this could lead to debate of the statute itself.[24] However, there may be a thin line between this consideration and the legitimate concern whether a statutory instrument is in fact a proper reflection of the policy established in the enabling Act. While the Statutory Instruments Committee correctly pointed out that the consideration of the merits of instruments could "strike at the root" of one of the major reasons for delegating discretionary authority in the first place--to permit the administrator to devise solutions to problems as they emerge[25]--it must be remembered that the main purpose of legislative scrutiny is to ensure that such solutions are within the framework of Parliament's intention. Indeed, MacGuigan has suggested that "it may even be argued that such a judgement on the merits is what Parliament is uniquely qualified to give, since the courts normally cannot take a position on whether a discretion has been exercised in a reasonable way."[26]

It is likely that any list of criteria for the review of statutory instruments could, with some justification, be supplemented, and so it seems reasonable to include the more obvious ones and assume that common sense will prevail during Committee discussion. (These criteria could be modified if experience demonstrated this to be desirable.) On this basis, the following specific criteria are suggested:

1. Is the statutory instrument authorized by the parent Act?
2. Does the statutory instrument make an unusual or unexpected use of the authority under which it is made?

3. Does the statutory instrument trespass unnecessarily on personal rights and liberties?
4. Is the statutory instrument retroactive without statutory authority?
5. Does the statutory instrument delegate power without statutory authority?
6. Does the statutory instrument impose a tax, or a charge on the public revenue other than the making of routine payments?
7. Does the statutory instrument exclude challenge in the courts?
8. Does the statutory instrument require clarification?

Although this list includes several criteria which relate primarily to the form of statutory instruments, there clearly is scope for the Committee to become involved in more substantive issues. Indeed, the flexibility inherent in items two and four could permit the Committee to skirt partially any prohibition of the consideration of merits. Nevertheless, the Committee should be empowered to refer statutory instruments to subject-matter committees for a consideration of policy implications.[27]

In view of the fact that guidelines have been established to control the drafting of enabling clauses, and provided that the Government is prepared to state reasons for any departure from them, there should be no need for these clauses to be submitted to the scrutiny committee for review. The committee stage of legislation should provide adequate opportunity to evaluate the suitability of enabling clauses within the context of each bill.

In all its deliberations, the Committee on Regulations and other Statutory Instruments will require the assistance of expert counsel to perform the initial scrutiny and to draw specific instruments to the Committee's attention. It is expected that in most instances where the Committee objects to a statutory instrument, informal discussion between the Committee, or its counsel, and the regulation-making authority will eliminate the disagreement. Indeed, this will likely be the most fruitful work of the Committee. The Committee should have explicit authority to question public servants and cabinet ministers concerning specific instruments, and to require written submissions defending instruments which in the Committee's view offend its criteria. Normally, the Committee should meet in public. However, *in camera* meetings should be permitted when this would facilitate the reaching of agreement with regulation-making authorities regarding controversial instruments.

Close liaison between the Committee and the executive branch is essential, and it lends support for a Government backbencher as one co-chairman. On the other hand, the greatest contact is likely to be, and certainly the initial contact will be, between the counsel and rule-making authorities, so that the political identity of the co-chairmen will be significant only in cases where disagreements cannot be resolved at this level. While a Government backbencher may have easier access to a minister than would a member of the opposition, it is hoped that the politics of the co-chairmen will become less important as the Committee earns a position of prestige, especially if the alternative to the reconciliation of differences is the reporting of instruments to

Parliament. Furthermore, the appearance of independence from Government control which an opposition co-chairman would create is important. Perhaps the present arrangement--an opposition member from the Commons and a Senator from the Government side, as joint chairmen--will satisfy both arguments.[28]

The importance of Committee reports will depend upon the nature of the reports and the provision for parliamentary reaction. The Committee should report at regular intervals, and also on an ad hoc basis when it feels some urgency with respect to specific instruments. The reporting of any instrument which offends against a scrutiny criterion should be supported by the Committee's views as well as those submitted in writing by the issuing authority.

Provision for parliamentary consideration of Committee reports is essential if the Committee is to perform its "main functions" which are, the Government agrees, "to expose regulations to the glare of publicity and [to] bring to the attention of the government and the public any objectionable features thereof."[29] The rules of both houses should therefore be amended to ensure, as the Government recommended, the "setting aside [of] a certain time on a regular basis for consideration of the reports [both regular and ad hoc] of the Committee."[30] If this were done, it should be unnecessary for the Committee to make specific recommendations for disposing of offending instruments except, perhaps, that they be referred back to the issuing authority for reconsideration. In any event, it is unlikely that the Government would back down before Parliament if it has already taken a firm position with the Committee. Hopefully, however, unfavourable reports will be an infrequent occurrence.

In conclusion, it would appear that the steps already taken by the Government and Parliament, and those recommended in this Chapter, to strengthen the control over subordinate legislation should significantly reduce the danger that discretionary power may be abused. Nevertheless, machinery alone will not prevent abuse. It must be supplemented by an alert Parliament and, indeed, an alert citizenry. Forty years ago, Corry acknowledged that "we cannot escape the growth of administrative discretion in the world in which we live," and he feared that "it may be open to doubt whether we have the energy and public spirit necessary for its effective control."[31] The present study has raised serious doubts as to whether Parliament has that energy. Hopefully, the operation of the new machinery, perhaps especially the Joint Committee on Regulations and Statutory Instruments, will stimulate the required interest. If it does not, we are in trouble.

Footnotes

[1] See above, p. 126.

[2] See above, p. 29.

[3] See above, p. 92.

[4] See above, pp. 216-217.

[5] See above, pp. 33-34.

[6] Statutory Instruments Committee, Third Report, p. 61.

[7] Statutory Instruments Act, s. 11(2). This protection is an improvement over that provided by section 6(3) of the Regulations Act. See above, pp. 207-208.

[8] See above, pp. 38-42.

[9] Statutory Instruments Committee, Minutes (Appendix "J"), October 7, 1969, pp. 256-261.

[10] The Government agreed that power to make regulations "in relation to" specific subjects "must be looked at as being suspect. (Ibid., p. 259.)

[11] See above, p. 127.

[12] The fact that regulation-making authorities are now more careful than in the past to quote the appropriate statutory authority when proposing regulations should facilitate this review. (Letter from J. L. Cross, January 21, 1974.)

[13] Responses to the Statutory Instruments Committee's questionnaire indicated that regulation-making authorities were concerned that additional control measures, whether executive or legislative in nature, might hinder efficient administration. This is understandable. However, the present study encountered no evidence to support a view that either the public service or the cabinet has attempted to subvert the will of Parliament.

[14] See above, p. 85.

[15] Unfortunately, however, it does not end the uncertainty which prevailed under the Regulations Act--whether or not instruments made under a subdelegated power are "regulations."

[16] Letter from J. L. Cross, January 21, 1974. Beseau has left the public service.

[17] See above, p. 5.

[18] There were a few instances of members suggesting that Parliament should refuse to delegate authority until the Government either established a scrutiny committee or at least stated its intentions with respect to the Statutory Instruments Committee recommendations.

[19] Letters from Hon. Robert L. Stanfield, Leader of the Opposition (January 31, 1974) and Mr. David Lewis, New Democratic Party leader (February 19, 1974). No reply was received from Mr. Réal Caouette. However, judging from the lack of interest expressed by members of the Ralliement Creditiste in 1969-70, it seems unlikely that there would be intra-Party machinery.

[20] See below, pp. 238-243.

[21] Several rule-making authorities indicated, in reply to the Statutory Instruments Committee questionnaire, that the implementation of regulations would in fact be delayed until Parliament had finished with them.

[22] Statutory Instruments Committee, Third Report, p. 88.

[23] It will be recalled that Mr. Turner told the House of Commons that he planned to have the scrutiny criteria "set forth in an internal cabinet directive" to guide the drafting of regulations. See above, p. 211.

[24] Statutory Instruments Committee, Third Report, p. 78.

[25] Ibid.

[26] Mark R. MacGuigan, "Legislative Review of Delegated Legislation," Canadian Bar Review, XLVI (1968), 711.

[27] The Statutory Instruments Committee has properly pointed out that "the review of significant subordinate legislation by Standing Committees is one of the most important means of exercising parliamentary scrutiny and control." (Third Report, p. 81.) For this reason, subject-matter committees should periodically review regulations, giving special attention to policy, in their respective subject areas.

[28] Gordon Fairweather and Senator Forsey were re-appointed as joint chairmen for the present (second) session of the twenty-ninth Parliament. (H. of C. Debates, April 10, 1974, Appendix, p. 13.)

[29] Statutory Instruments Committee, Minutes (Appendix "J"), October 7, 1969, p. 261.

[30] *Ibid.*, p. 256. Additional time would, of course, be available at the ten o'clock adjournment, on allotted days, and during private members' hours.

[31] J. A. Corry, "Administrative Law in Canada," p. 207.

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APPENDIX A

REGULATIONS ACT AND REGULATIONS MADE PURSUANT TO IT[a]

CHAPTER R-5

An Act to provide for the publication of statutory regulations

SHORT TITLE

1. This Act may be cited as the *Regulations Act*. R.S., c. 235, s. 1.

INTERPRETATION

2. In this Act

"regulation" means a rule, order, regulation, by-law or proclamation

(*a*) made, in the exercise of a legislative power conferred by or under an Act of Parliament, by the Governor in Council, the Treasury Board, a minister of the Crown, or a board, commission, corporation or other body or person that is an agent or servant of Her Majesty in right of Canada, or

(*b*) for the contravention of which a penalty of fine or imprisonment is prescribed by or under an Act of Parliament,

but does not include

(*c*) an ordinance of the Yukon Territory or the Northwest Territories,

(*d*) an order or decision of a judicial tribunal,

(*e*) a rule, order or regulation governing the practice or procedure in any proceedings before a judicial tribunal, or

(*f*) a rule, order, regulation or by-law of a corporation incorporated by or under an Act of Parliament unless the rule, order, regulation or by-law comes within paragraph (*b*);

"regulation-making authority" means every authority authorized to make regulations and with reference to a regulation means the authority that made the regulation. R.S., c. 235, s. 2.

TRANSMISSION AND RECORDING

3. (1) Every regulation-making authority shall, within seven days after making a regulation or, in the case of a regulation made in the first instance in one only of its official language versions, within seven days after its making in that version, transmit copies of the regulation in both official languages to the Clerk of the Privy Council.

(2) A copy of a regulation transmitted to the Clerk of the Privy Council under subsection (1), other than one made by the Governor in Council or the Treasury Board, shall be certified by the regulation-making authority to be a true copy of the regulation. R.S., c. 235, s. 3; 1968-69, c. 54, s. 39.

4. (1) The Clerk of the Privy Council shall maintain a record in which he shall record the regulations transmitted to him under section 3 and the regulations made by the Governor in Council or the Treasury Board.

(2) Every regulation recorded under this section shall bear a number assigned to it by the Clerk of the Privy Council, but all copies of the same regulation, whether they are in English or in French, shall bear the same number. R.S., c. 235, s. 4.

5. (1) A regulation is not invalid by reason only that it was not transmitted to the Clerk of the Privy Council, certified or recorded as required by this Act.

(2) In addition to any other mode of citation, regulations may be cited or referred to by the expression "Statutory Orders and Regulations" or "SOR" followed by the number thereof. R.S., c. 235, s. 5.

PUBLICATION

6. (1) Every regulation shall be published in the *Canada Gazette* within twenty-three days after copies thereof in both official languages are transmitted to the Clerk of the Privy Council pursuant to subsection 3(1).

(2) A regulation-making authority may by order extend the time for publication of a regulation and the order shall be published with the regulation.

(3) No regulation is invalid by reason only that it was not published in the *Canada Gazette*, but no person shall be convicted for an offence consisting of a contravention of any regulation that at the time of the alleged contravention was not published in the *Canada Gazette* in both official languages unless

(*a*) the regulation was, pursuant to section 9, exempted from the operation of subsection (1), or the regulation expressly provides that it shall operate according to its terms prior to publication in the *Canada Gazette*, and

(*b*) it is proved that at the date of the alleged contravention reasonable steps had been taken for the purpose of bringing the purport of the regulation to the notice of the public, or the persons likely to be affected by it, or of the person charged. R.S., c. 235, s. 6; 1968-69, c. 54, s. 39.

REPORT TO PARLIAMENT

7. Every regulation shall be laid before Parliament within fifteen days after it is published in the *Canada Gazette* or, if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session. R.S., c. 235, s. 7.

JUDICIAL NOTICE

8. (1) A regulation that has been published in the *Canada Gazette* shall be judicially noticed.

(2) In addition to any other mode of proof, evidence of a regulation may be given by the production of the *Canada Gazette* purporting to contain the text thereof.

(3) For the purposes of this section the publication of a regulation in a consolidation or supplement published pursuant to section 9 is deemed to be publication in the *Canada Gazette*. R.S., c. 235, s. 8.

REGULATIONS

9. (1) The Governor in Council may make regulations

(*a*) prescribing the powers and duties of the Clerk of the Privy Council under this Act;

(*b*) prescribing the system of recording, indexing and preparation for the publication of regulations;

(*c*) providing for the preparation and publication of consolidations of regulations and for the preparation and publication of supplements to such consolidations; and

(*d*) for carrying out the purposes and provisions of this Act.

(2) The Governor in Council may by regulation exempt any regulation or class of regulations from the operation of section 3, section 4, subsection 6(1), and section 7, but every regulation made under this subsection shall be published in English and in French in the *Canada Gazette* within thirty days after it is made and shall be laid before Parliament within fifteen days after it is published in the *Canada Gazette* or, if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session. R.S., c. 235, s. 9.

SCHEDULE.

Enactments Repealed.

Title.	Chapter.	Extent of Repeal.
Aeronautics Act	R.S.C. 1927, c. 3	Sections 19 and 20, as enacted by 1944–45, c. 28, s. 6.
Animal Contagious Diseases Act	R.S.C. 1927, c. 6	Sections 6 and 7.
Government Annuities Act	R.S.C. 1927, c. 7	In section 16, all the words after the word "session" in the fifth line thereof.
Savings Banks Act	R.S.C. 1927, c. 15	Subsections (2) and (3) of section 14; sections 37 and 38.
Civil Service Act	R.S.C. 1927, c. 22	In subsection (2) of section 5, the words "and shall be published in the *Canada Gazette*".
Cold Storage Act	R.S.C. 1927, c. 25	Subsection (2) of section 10.
Combines Investigation Act	R.S.C. 1927, c. 26	Subsections (2) and (3) of section 40
Copyright Act	R.S.C. 1927, c. 32	In subsection (1) of section 10C, as enacted by 1936, c. 28, s. 2, the words "and that any Order or Orders made as aforesaid by the Governor in Council shall be published as soon as practicable in the *Canada Gazette*"; subsection (3) of section 44.
Currency Act	R.S.C. 1927, c. 40	Subsection (2) of section 20; subsection (3) of section 21.
Customs Act	R.S.C. 1927, c. 42	Subsection (2) of section 43, as enacted by 1930 (second session) c. 2, s. 4; in paragraph (*f*) of subsection (1) of section 290, as enacted by 1937, c. 24, s. 10, the words "Such regulations shall, when made, have the force and effect of law as though enacted as a part of this statute, and shall be published in the *Canada Gazette*"; section 301.
Customs and Fisheries Protection Act	R.S.C. 1927, c. 43	Section 4.
Customs Tariff	R.S.C. 1927, c. 44	Subsection (2) of section 16, as enacted by 1931, c. 30, s. 1; in section 18, as enacted by 1935, c. 26, s. 4, the words "upon publication of such order in the *Canada Gazette*".
Dairy Industry Act	R.S.C. 1927, c. 45	Subsection (2) of section 3; subsection (2) of section 30.
Destructive Insect and Pest Act	R.S.C. 1927, c. 47	Section 10.
Electricity and Fluid Exportation Act	R.S.C. 1927, c. 54	Subsection (2) of section 3; in section 4, the words "published in the *Canada Gazette*".
Export Act	R.S.C. 1927, c. 63	In section 2, the words "published in the *Canada Gazette*"; in section 3, the words "published in the *Canada Gazette*"; in subsection (2) of section 4, the words "published in like manner"; subsection (2) of section 7.
Ferries Act	R.S.C. 1927, c. 68	Subsection (2) of section 7; section 3.

SCHEDULE—*Continued*

Title.	Chapter.	Extent of Repeal.
Department of Finance and Treasury Board Act	R.S.C. 1927, c. 71	Subsection (2) of section 12, as enacted by 1931, c. 48, s. 1.
Deep Sea Fisheries Act	R.S.C. 1927, c. 74	Subsection (2) of section 7.
Food and Drugs Act	R.S.C. 1927, c. 76	Subsection (2) of section 3.
Meat and Canned Foods Act	R.S.C. 1927, c. 77	Subsections (2), (3), (4) and (5) of section 4.
Gas Inspection Act	R.S.C. 1927, c. 82	In subsection (1) of section 11, the words "and published in the *Canada Gazette*".
Government Harbours and Piers Act	R.S.C. 1927, c. 89	Section 3.
Public Works Health Act	R.S.C. 1927, c. 91	Section 3.
Railway Belt Act	R.S.C. 1927, c. 116	Subsection (2) of section 6.
Dominion Lands Surveys Act	R.S.C. 1927, c. 117	Section 5.
Live Stock Shipping Act	R.S.C. 1927, c. 122	Subsection (2) of section 3.
White Phosphorous Matches Act	R.S.C. 1927, c. 128	Subsections (2) and (3) of section 7.
Migratory Birds Convention Act	R.S.C. 1927, c. 130	Subsection (2) of section 4.
Navigable Waters' Protection Act	R.S.C. 1927, c. 140	Sections 12 and 33; in section 23, the words "published in the *Canada Gazette*".
Proprietary or Patent Medicine Act	R.S.C. 1927, c. 151	In section 21, the words "and notice thereof shall be given in the *Canada Gazette*"; in subsection (1) of section 22, all the words before the words "any violation" in the third line thereof, and the word "such" in the third line thereof; subsection (2) of section 22.
Old Age Pensions Act	R.S.C. 1927, c. 156	Section 20.
Royal Canadian Mounted Police Act	R.S.C. 1927, c. 160	Section 25.
Post Office Act	R.S.C. 1927, c. 161	Section 8.
Public Service Rearrangement and Transfer of Duties Act	R.S.C. 1927, c. 165	Subsection (2) of section 2.
Public Works Act	R.S.C. 1927, c. 166	Section 43.
Quarantine Act	R.S.C. 1927, c. 168	Section 9.
Department of Transport Act	R.S.C. 1927, c. 171	Section 23.
Government Railways Act	R.S.C. 1927, c. 173	Sections 57 and 65.
Soldier Settlement Act	R.S.C. 1927, c. 188	Subsection (2) of section 64.
Weights and Measures Act	R.S.C. 1927, c. 212	Subsection (2) of section 52; subsection (2) of section 53.
Yukon Quartz Mining Act	R.S.C. 1927, c. 217	In subsection (2) of section 54, as enacted by 1932, c. 23, s. 1, the words "All regulations made under this section shall be laid before both Houses of Parliament within the first fifteen days of the session next after the date thereof".
The Electricity Inspection Act, 1928	1928, c. 23	In section 21, the words "and published in the Canada Gazette".
The Trade Agreements Act, 1935	1935, c. 52	In section 5, the words "which proclamation shall be published in the *Canada Gazette*".
The Opium and Narcotic Drug Act, 1929	1929, c. 49	In section 24, as enacted by 1938, c. 9, s. 6, all the words after the word "[illegible]" in the sixth line thereof.

SCHEDULE—*Continued*

Title.	Chapter.	Extent of Repeal.
The Canada Grain Act	1930 (1st Sess.), c. 5	In subsection (1) of section 17, the words "and shall be published in the *Canada Gazette*".
The National Parks Act	1930 (1st Sess.), c. 33	Subsection (2) of section 7.
The Consolidated Revenue and Audit Act, 1931	1931, c. 27	In section 16, all the words after the word "securities" in the third line thereof.
The Gold Export Act	1932, c. 33	Subsection (2) of section 2.
The Unfair Competition Act, 1932	1932, c. 38	Subsection (2) of section 33.
The Fisheries Act, 1932	1932, c. 42	Subsection (2) of section 34.
The Canadian and British Insurance Companies Act, 1932	1932, c. 46	Subsection (3) of section 2.
The Foreign Insurance Companies Act, 1932	1932, c. 47	Subsection (3) of section 2.
The Translation Bureau Act	1934, c. 25	Subsection (2) of section 6.
The Companies Act, 1934	1934, c. 33	In section 123, all the words after the word "Part" in the third line thereof.
Canada Shipping Act, 1934	1934, c. 44	In subsection (1) of section 221, the words "and published in the *Canada Gazette*"; subsection (6) of section 637; subsection (3) of section 703A, as enacted by 1938, c. 26; section 712.
The Fair Wages and Hours of Labour Act, 1935	1935, c. 39	Subsection (2) of section 6.
The Canadian Wheat Board Act, 1935	1935, c. 53	Subsection (2) of section 20, as enacted by 1947, c. 15, s. 5.
The Fruit, Vegetables and Honey Act	1935, c. 62	Subsection (3) of section 2.
The National Employment Commission Act, 1936	1936, c. 7	Subsection (2) of section 10; section 12.
The Canadian Broadcasting Act, 1936	1936, c. 24	Subsection (2) of section 22.
The Veterans' Assistance Commission Act, 1936	1936, c. 47	Subsection (2) of section 11.
The Home Improvement Loans Guarantee Act, 1937	1937, c. 11	Subsection (2) of section 8.
The Feeding Stuffs Act, 1937	1937, c. 30	Section 16.
The Foreign Enlistment Act, 1937	1937, c. 32	Subsection (2) of section 19.
The Northern Pacific Halibut Fishery (Convention) Act, 1937	1937, c. 36	Subsection (6) of section 9.
The Municipal Improvements Assistance Act, 1938	1938, c. 33	Subsection (2) of section 9.
The National Housing Act, 1938	1938, c. 49	Subsection (2) of section 8; subsection (2) of section 16; subsection (2) of section 27.
The Radio Act, 1938	1938, c. 50	Section 14.
The Penitentiary Act, 1939	1939, c. 6	In subsection (1) of section 22, the words "to be published in the *Canada Gazette*"; in subsection (2) of section 22, the words "published as aforesaid"

SCHEDULE—*Continued*

Title.	Chapter.	Extent of Repeal.
The Carriage by Air Act, 1939..	1939 (1st Sess.), c. 12	Subsection (2) of section 4.
The Cheese and Cheese Factory Improvement Act...........	1939 (1st Sess.), c. 13	Section 9.
The Seals Act, 1939...........	1939 (1st Sess.), c. 22	Subsection (2) of section 4.
The Grain Futures Act, 1939...	1939 (1st Sess.), c. 31	Subsection (3) of section 5.
The Live Stock and Live Stock Products Act, 1939...........	1939 (1st Sess.), c. 47	Section 10.
The Prairie Farm Assistance Act, 1939.........................	1939 (1st Sess.), c. 50	Subsection (2) of section 14, as renumbered by 1940, c. 38, s. 9.
The Salt Fish Board Act......	1939 (1st Sess.), c. 51	Subsection (2) of section 10.
The Unemployment Insurance Act, 1940....................	1940, c. 44..........	In subsection (1) of section 98, as renumbered by 1946, c. 68, s. 26, all the words after the words "Governor in Council" in the second line thereof.
The Veterans' Land Act, 1942..	1942-43, c. 33......	Subsection (2) of section 37.
The War Risk Insurance Act, 1942.........................	1942-43, c. 35......	Subsection (2) of section 34.
The Department of Veterans Affairs Act..................	1944-45, c. 19......	Subsection (2) of section 6.
The Department of National Health and Welfare Act......	1944-45, c. 22......	Section 10.
The Agricultural Prices Support Act, 1944...............	1944-45, c. 29......	The proviso in subsection (1) of section 11; subsection (2) of section 11.
The Canada-United States of America Tax Convention Act, 1944.........................	1944-45, c. 31......	Subsection (2) of section 4.
The Export Credits Insurance Act.........................	1944-45, c. 39......	Subsection (2) of section 27.
The Family Allowances Act, 1944.........................	1944-45, c. 40......	Section 12.
The Farm Improvement Loans Act, 1944..................	1944-45, c. 41......	Subsection (2) of section 6.
The Fisheries Prices Support Act, 1944..................	1944-45, c. 42......	Subsection (2) of section 11.
The National Housing Act, 1944	1944-45, c. 46......	Subsection (2) of section 21
The Food and Agriculture Organization of the United Nations Act, 1945...............	1945 (2nd Sess.), c. 4	Subsection (4) of section 2.
The Bretton Woods Agreements Act, 1945....................	1945 (2nd Sess.), c. 11	Subsection (3) of section 2.
The Explosives Act, 1946......	1946, c. 7...........	Subsection (2) of section 4.
The United Kingdom Financial Agreement Act, 1946.........	1946, c. 12..........	Subsection (2) of section 7.
The Canadian Citizenship Act..	1946, c. 15..........	Subsection (2) of section 39.
The Atomic Energy Control Act, 1946.........................	1946, c. 37..........	Subsection (2) of section 9.
The Canada-United Kingdom Income Tax Agreement Act, 1946.........................	1946, c. 38..........	Subsection (2) of section 4.
The Canada-United Kingdom Succession Duty Agreement Act, 1946....................	1946, c. 39..........	Subsection (2) of section 4.
The Foreign Exchange Control Act.........................	1946, c. 53..........	Subsections (2) and (3) of section 35.

SCHEDULE—*Concluded*

Title.	Chapter.	Extent of Repeal.
The Reinstatement in Civil Employment Act, 1946..........	1946, c. 63..........	In section 22, all the words after the word "Act" in the third line thereof down to and including the word "regulation" in the ninth line thereof.
The Veterans' Business and Professional Loans Act..........	1946, c. 69..........	Subsection (3) of section 7.
The Agricultural Products Act.	1947, c. 10..........	Subsection (2) of section 5.
The Export and Import Permits Act........................	1947, c. 17..........	In section 3, the words "which order shall be published in the *Canada Gazette* within fifteen days after the passing of such order"; in section 4, the words "which order shall be published in the *Canada Gazette* within fifteen days after the passing of such order".
The Government Employees Compensation Act, 1947.....	1947, c. 18..........	Subsection (2) of section 11.
The United Nations Act, 1947.	1947, c. 46..........	Section 5.
The Dominion Coal Board Act, 1947........................	1947, c. 57..........	Subsections (2) and (6) of section 11
The Privileges and Immunities (United Nations) Act........	1947, c. 69..........	Section 4.
The Emergency Exchange Conservation Act...............	1947-48, c. 7........	Subsection (4) of section 5.
The Emergency Gold Mining Assistance Act...............	1947-48, c. 15.......	Subsection (2) of section 6.
The Canada-New Zealand Income Tax Agreement Act, 1948........................	1947-48, c. 34.......	Subsection (2) of section 4.
The Industrial Relations and Disputes Investigation Act...	1947-48, c. 54.......	Subsection (2) of section 67.
The Treaties of Peace (Italy, Roumania, Hungary and Finland) Act, 1948..............	1947-48, c. 71.......	Section 5.
The Canada Forestry Act......	1949 (2nd Sess.), c. 8	Subsection (2) of section 7.
The National Trade Mark and True Labelling Act..........	1949 (2nd Sess.), c. 31.............	Subsection (2) of section 5.

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SOR/54-569

Regulations Act—Regulations under section 9 of the Act

P.C. 1954-1787

AT THE GOVERNMENT HOUSE AT OTTAWA

THURSDAY, the 18th day of November, 1954.

PRESENT:

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL

His Excellency the Governor General in Council, on the recommendation of the Right Honourable Louis St-Laurent, the Prime Minister, and pursuant to section 9 of the Regulations Act and to section 29 of the Public Printing and Stationery Act, is pleased to revoke the regulations made by Order in Council P.C. 6173 of 21st December, 1950, as amended, and to make in substitution therefor the following regulations which are hereby made and established, accordingly:

REGULATIONS

1. In these regulations, "Act" means the Regulations Act.

2. (1) The *Canada Gazette* shall continue to be printed in two parts, namely, Part I and Part II.

(2) Part I shall contain such matter as may be required to be published in the *Canada Gazette*, other than regulations as defined in paragraph (*a*) of section 2 of the Act.

(3) Part II shall contain regulations as defined in paragraph (*a*) of section 2 of the Act.

3. (1) Part II of the *Canada Gazette* shall continue to be published by the Queen's Printer under the title "Statutory Orders and Regulations" on the second and fourth Wednesday of each month in separate editions in the English and French languages.

(2) Copies of Part II and of all consolidations of regulations shall be delivered to such persons as are entitled to receive copies of the Statutes of Canada, and may be sold to the general public upon such conditions as may be determined by the Queen's Printer from time to time.

4. Two copies of every proposed regulation shall, before it is made, be submitted in draft form to the Clerk of the Privy Council who shall, in consultation with the Deputy Minister of Justice, examine the same to ensure that the form and draftsmanship thereof are in accordance with the established standards.

5. Three copies in English and one in French [illegible] regulation, one copy of which shall be certified, shall be transmi[illegible] the Clerk of the Privy Council, in accordance with section 3 of the [illegible]

6. When received and recorded pursuant to sections 3 and 4 of the Act, regulations shall have affixed to them by the Clerk of the Privy Council the designation "S.O.R." followed by an appropriate number.

7. A consolidation of all regulations then in force shall be published from time to time when determined by the Governor in Council.

8. The Clerk of the Privy Council shall cause to be published quarterly a consolidated index and table of all regulations and amendments, revocations or other modifications made since the last preceding consolidation.

9. Pursuant to section 9 of the Act the following regulations or classes of regulations are hereby exempted from the operation of section 3, section 4, subsection (1) of section 6 and section 7 of the Act:

(1) *Aeronautics Act*—Orders made by the Air Transport Board that do not apply to all carriers or to a class of carrier.

(2) *Atomic Energy Control Act*—Orders made by the Atomic Energy Control Board under the Atomic Energy Regulations of Canada.

(3) *Canada Grain Act*—Orders made under section 11 and orders as defined in section 16.

(4) *Canadian Wheat Board Act*—Orders made by the Canadian Wheat Board as specified hereunder:

- (*a*) Orders entitled "Instructions to the Trade";
- (*b*) Orders addressed to particular persons or corporations only, requiring them to do or to refrain from doing specified things;
- (*c*) Orders adjusting grain storage quotas at delivery points according to the availability of storage space from time to time; and
- (*d*) Orders providing for the allocation of railway cars available for the shipment of grain at delivery points.

(5) *Financial Administration Act*—Regulations that deal exclusively with matters of internal practice and procedure within the Public Service, that do not impose fines or penalties, and that are restricted in their application to persons within the Public Service.

(6) *Indian Act*—Regulations and orders for the control and management of Indian reserves and property, residential and day schools, procedure at band and band council meetings, and generally in respect of all matters of a local or private nature within reserves.

(7) *National Defence Act*—Regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces, that are registered in their effect to members of or persons attached to the Canadian Forces.

(8) *Penitentiary Act*—Regulations made under section 7.

(9) *Prisons and Reformatories Act*—All regulations made under the Act.

(10) *Post Office Act*—Orders made by the Postmaster General for the guidance and government of officers and employees of the postal service.

(11) *Railway Act*—By-laws, rules and regulations made by the Canadian National Railways under sections 290 and 300.

(12) *Railway Act and other related Acts*—Rules, orders and regulations of the Board of Transport Commissioners for Canada made in the exercise of any power conferred on the Board by the Railway Act or any other Act.

(13) *Royal Canadian Mounted Police Act*—Orders and regulations relating to the organization, discipline, administration and government of the Royal Canadian Mounted Police, that are restricted in their effect to members of or persons attached to the Royal Canadian Mounted Police.

[a] Regulations Act, R. S. C., 1970, c. R-5 (marginal notes omitted.) The Schedule is from the Regulations Act, S. C., 1950, c. 50.

APPENDIX B

STATUTORY INSTRUMENTS ACT AND REGULATIONS MADE PURSUANT TO IT[a]

19-20 ELIZABETH II

CHAPTER 38

An Act to provide for the examination, publication and scrutiny of regulations and other statutory instruments

[*Assented to 19th May, 1971*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

1. This Act may be cited as the *Statutory Instruments Act*.

INTERPRETATION

2. (1) In this Act,

(*a*) "prescribed" means prescribed by regulations made pursuant to this Act;

(*b*) "regulation" means a statutory instrument

(i) made in the exercise of a legislative power conferred by or under an Act of Parliament, or

(ii) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament;

(*c*) "regulation-making authority" means any authority authorized to make regulations and, with reference to any particular regulation or proposed regulation, means the authority that made or proposes to make the regulation; and

(*d*) "statutory instrument" means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(i) in the execution of a power conferred by or under an Act of Parliament, by or under which such instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which such instrument relates, or

(ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament,

but does not include

(iii) any such instrument issued, made or established by a corporation incorporated by or under an Act of Parliament unless

(A) the instrument is a regulation and the corporation by which it is made is one that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, or

(B) the instrument is one for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

(iv) any such instrument issued, made or established by a judicial or quasi-judicial body, unless the instrument is a rule, order or regulation governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament,

(v) any such instrument in respect of which, or in respect of the production or other disclosure of which, any privilege exists by law or whose contents are limited to advice or information intended only for use or assistance in the making of a decision or the determination of policy, or in the ascertainment of any matter necessarily incidental thereto, or

(vi) an ordinance of the Yukon Territory or the Northwest Territories or any instrument issued, made or established thereunder.

(2) In applying paragraph (*b*) of subsection (1) for the purpose of determining whether or not an instrument described in subparagraph (iii) of paragraph (*d*) of that subsection is a regulation, such instrument shall be deemed to be a statutory instrument, and any instrument accordingly determined to be a regulation shall be deemed to be a regulation for all purposes of this Act.

EXAMINATION OF PROPOSED REGULATIONS

3. (1) Where a regulation-making authority proposes to make a regulation it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages.

(2) Upon receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that

(*a*) it is authorized by the statute pursuant to which it is to be made;

(*b*) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

(*c*) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Bill of Rights*; and

(*d*) the form and draftsmanship of the proposed regulation are in accordance with established standards.

(3) When a proposed regulation has been examined as required by subsection (2), the Clerk of the Privy Council shall advise the regulation-making authority that the proposed regulation has been so examined and shall indicate any matter referred to in paragraph (*a*), (*b*), (*c*) or (*d*) of that subsection to which, in the opinion of the Deputy Minister of Justice, based on such examination, the attention of the regulation-making authority should be drawn.

(4) Subsection (1) does not apply to any proposed regulation or class of regulation that, pursuant to paragraph (*a*) of section 27, is exempted from the application of that subsection, and paragraph (*d*) of subsection (2) does not apply to any proposed rule, order or regulation governing the practice or procedure in any proceedings before the Supreme Court of Canada or the Federal Court of Canada.

4. Where any regulation-making authority or other authority responsible for the issue, making or establishment of a statutory instrument, or any person acting on behalf of such an authority, is uncertain as to whether or not a proposed statutory instrument would be a regulation if it were issued, made or established by such authority, it or he shall cause a copy of the proposed statutory instrument to be forwarded to the Deputy Minister of Justice who shall determine whether or not the instrument would be a regulation if it were so issued, made or established.

TRANSMISSION AND REGISTRATION

5. (1) Every regulation-making authority shall, within seven days after making a regulation or, in the case of a regulation made in the first instance in one only of its official language versions, within seven days after its making in that version, transmit copies of the regulation in both official languages to the Clerk of the Privy Council for registration pursuant to section 6.

(2) One copy of each of the official language versions of each regulation that is transmitted to the Clerk of the Privy Council pursuant to subsection (1), other than a regulation made or approved by the Governor in Council, shall be certified by the regulation-making authority to be a true copy thereof.

(3) Subsection (1) does not apply to any regulation of a class that, pursuant to paragraph (*b*) of section 27, is exempted from the application of that subsection.

6. Subject to subsection (1) of section 7, the Clerk of the Privy Council shall register

(*a*) every regulation transmitted to him pursuant to subsection (1) of section 5;

(*b*) every statutory instrument, other than a regulation, that is required by or under any Act of Parliament to be published in the *Canada Gazette* and is so published; and

(*c*) every statutory instrument or other document that, pursuant to any regulation made under paragraph (*g*) of section 27, is directed or authorised by the Clerk of the Privy Council to be published in the *Canada Gazette.*

7. (1) Where any statutory instrument is transmitted or forwarded to the Clerk of the Privy Council for registration under this Act, the Clerk of the Privy Council may refuse to register the instrument if

(*a*) he is not advised that the instrument was, before it was issued, made or established, determined by the Deputy Minister of Justice pursuant to section 4 to be one that would, if it were issued, made or established, not be a regulation; and,

(*b*) in his opinion, the instrument was, before it was issued, made or established, a proposed regulation to which subsection (1) of section 3 applied and was not examined in accordance with subsection (2) of that section.

(2) Where the Clerk of the Privy Council refuses to register any statutory instrument for the reasons referred to in subsection (1), he shall forward a copy of the instrument to the Deputy Minister of Justice who shall determine whether or not it is a regulation.

POWER TO REVOKE REGULATIONS

8. No regulation is invalid by reason only that it was not examined in accordance with subsection (2) of section 3, but where any statutory instrument that was issued, made or established without having been so examined

(*a*) was, before it was issued, made or established, determined by the Deputy Minister of Justice pursuant to section 4 to be one that would, if it were issued, made or established, be a regulation, or

(*b*) has, since its issue, making or establishment, been determined by the Deputy Minister of Justice pursuant to section 7 to be a regulation,

the Governor in Council, on the recommendation of the Minister of Justice, may, notwithstanding the provisions of the Act by or under the authority of which the instrument was or purports to have been issued, made or established, revoke the instrument in whole or in part and thereupon cause the regulation-making authority or other authority by which it was issued, made or established to be notified in writing of his action.

COMING INTO FORCE OF REGULATIONS

9. (1) No regulation shall come into force on a day earlier than the day on which it is registered unless

(*a*) it expressly states that it comes into force on a day earlier than that day and is registered within seven days after it is made, or (*b*) it is a regulation of a class that, pursuant to paragraph (*b*) of section 27, is exempted from the application of subsection (1) of section 5,

in which case it shall come into force, except as otherwise authorized or provided by or under the Act pursuant to which it is made, on the day on which it is made or on such later day as may be stated in the regulation.

(2) Where a regulation is expressed to come into force on a day earlier than the day on which it is registered, the regulation-making authority shall advise the Clerk of the Privy Council in writing of the reasons why it is not practical for the regulation to come into force on the day on which it is registered.

PUBLICATION IN CANADA GAZETTE

10. The Queen's Printer shall continue to publish the *Canada Gazette* as the official gazette of Canada.

11. (1) Subject to any regulations made pursuant to paragraph (*c*) of section 27, every regulation shall be published in the *Canada Gazette* within twenty-three days after copies thereof in both official languages are registered pursuant to section 6.

(2) No regulation is invalid by reason only that it was not published in the *Canada Gazette*, but no person shall be convicted of an offence consisting of a contravention of any regulation that at the time of the alleged contravention was not published in the *Canada Gazette* in both official languages unless

(*a*) the regulation was exempted from the application of subsection (1) pursuant to paragraph (*c*) of section 27, or the regulation expressly provides that it shall apply according to its terms before it is published in the *Canada Gazette*, and

(*b*) it is proved that at the date of the alleged contravention reasonable steps had been taken to bring the purport of the regulation to the notice of those persons likely to be affected by it.

12. Notwithstanding anything in this Act, the Governor in Council may by regulation direct that any statutory instrument or other document, or any class thereof, be published in the *Canada Gazette* and the Clerk of the Privy Council, where authorized by regulations made by the Governor in Council, may direct or authorize the publication in the *Canada Gazette* of any statutory instrument or other document, the publication of which, in his opinion, is in the public interest.

DISTRIBUTION OF CANADA GAZETTE

13. (1) A copy of each regulation that is published in the *Canada Gazette* shall be provided to each member of the Senate and House of Commons by delivering to each such member without charge a copy of the *Canada Gazette* in which the regulation is published.

(2) Copies of the *Canada Gazette* shall be delivered without charge to such persons or classes of persons, in addition to those described in subsection (1), as may be prescribed and may be sold to any person upon payment of the charge prescribed therefor.

INDEXES

14. (1) The Clerk of the Privy Council shall prepare and the Queen's Printer shall publish quarterly a consolidated index of all regulations and amendments to regulations in force at any time after the end of the preceding calendar year, other than any regulation that is exempted from the application of subsection (1) of section 11 as a regulation described in subparagraph (iii) of paragraph (*c*) of section 27.

(2) The Queen's Printer shall prepare and publish a quarterly index of all documents, other than regulations, that have been published in the *Canada Gazette* during the three-month period immediately preceding the month in which the index is published.

REVISIONS AND CONSOLIDATIONS OF REGULATIONS

15. There is hereby established a Committee consisting of the Clerk of the Privy Council, the Deputy Minister of Justice and not more than three other persons to be appointed from time to time by the Governor in Council.

16. As soon as reasonably possible after each arrangement, revision and consolidation of the public general statutes of Canada and at such other times as the Governor in Council may direct, the Committee shall examine the last preceding consolidation of the regulations and all regulations and amendments to regulations made since such consolidation, other than regulations that are exempted from the application of subsection (1) of section 11 or that are of a class that, if they had been made after the coming into force of this Act, would have been so exempted, and shall prepare a consolidation of all such regulations and amendments thereto examined by it that, in the opinion of the Committee, are intended to be of continuing effect and ought to be included in the consolidation.

17. (1) As soon as the Committee reports in writing the completion of any consolidation of regulations referred to in section 16, the Governor General may cause a printed Roll thereof, attested under his signature and the signatures of the Clerk of the Privy Council and the Deputy Minister of Justice, to be deposited in the office of the Clerk of the Privy Council, which Roll shall be deemed to be the original of the regulations so consolidated.

(2) After the completion of any consolidation of regulations referred to in section 16, the Committee may prepare for publication as part of the consolidation a supplement thereto, showing, as amendments or additions to the consolidation, any regulations or amendments thereto made before the coming into force of the consolidation, and any such regulations or amendments thereto shall be deemed to be included in and to be part of the consolidation and any citation of a regulation included in the consolidation shall be deemed to include any amendments thereto contained in the supplement.

18. There shall be appended to the Roll referred to in subsection (1) of section 17 a Schedule in which the Committee may include all regulations and provisions of regulations that, though not expressly revoked, are superseded by the regulations so consolidated, or are inconsistent therewith, and all regulations and provisions of regulations that were for a temporary purpose, the force of which is spent.

19. In the preparation of any consolidation of regulations referred to in section 16, the Committee may omit any regulation or provision thereof that is obsolete or spent, may make such alterations in the language and punctuation of any regulation as are necessary to obtain a uniform mode of expression, and may make such minor amendments as are necessary to convey more clearly that which it deems to be the intention of the regulation-making authority or to reconcile seemingly inconsistent provisions or to correct clerical, grammatical or typographical errors.

20. After the deposit of any Roll referred to in subsection (1) of section 17, a proclamation may issue fixing the day upon which the regulations included in the Roll shall come into force and have effect as law, by the designation of the "Consolidated Regulations of Canada, 19...".

21. (1) On the day fixed by proclamation pursuant to section 20, the regulations included in the Roll shall come into force and have effect as and by the designation of the "Consolidated Regulations of Canada, 19...", to all intents as if each such regulation had been made by the appropriate regulation-making authority and, where approval of any other authority is required by the Act pursuant to which it would otherwise have been made, with the approval of such other authority.

(2) On the day referred to in subsection (1), all regulations and provisions of regulations set out in the Schedule to the Roll are revoked to the extent mentioned in that Schedule.

22. (1) Where the Clerk of the Privy Council, after consultation with the Deputy Minister of Justice, is of the opinion that any particular regulations should be revised or consolidated, he may request the regulation-making authority or any person acting on behalf of such authority to prepare a revision or consolidation of those regulations.

(2) Where any authority or person referred to in subsection (1) fails to comply within a reasonable time with a request made pursuant to that subsection, the Governor in Council may, by order, direct that authority or person to comply with the request within such period of time as he may specify in the order

JUDICIAL NOTICE OF STATUTORY INSTRUMENTS

23. (1) A statutory instrument that has been published in the *Canada Gazette* shall be judicially noticed.

(2) In addition to any other manner of proving the existence or contents of a statutory instrument, evidence of the existence or contents of a statutory instrument may be given by the production of a copy of the *Canada Gazette* purporting to contain the text of the statutory instrument.

(3) For the purposes of this section, where a regulation is included in a copy of a consolidation of regulations purporting to be printed by the Queen's Printer, that regulation shall be deemed to have been published in the *Canada Gazette*.

RIGHT OF ACCESS TO STATUTORY INSTRUMENTS

24. Subject to any other Act of Parliament and to any regulations made pursuant to paragraph (*d*) of section 27, any person may, upon payment of the fee prescribed therefor, inspect

(*a*) any statutory instrument that has been registered by the Clerk of the Privy Council, by attending at the office of the Clerk of the Privy Council or at such other place as may be designated by him and requesting that the statutory instrument be produced for inspection; or

(*b*) any statutory instrument that has not been registered by the Clerk of the Privy Council, by attending at the head or central office of the authority that made the statutory instrument or at such other place as may be designated by such authority and requesting that the statutory instrument be produced for inspection.

25. Subject to any other Act of Parliament and to any regulations made pursuant to paragraph (*d*) of section 27, any person may, upon payment of the fee prescribed therefor, obtain copies of

(*a*) any statutory instrument that has been registered by the Clerk of the Privy Council, by writing to the Clerk of the Privy Council or by attending at the office of the Clerk of the Privy Council or at such other place as may be designated by him, and requesting that a copy of the statutory instrument be provided; or

(*b*) any statutory instrument that has not been registered by the Clerk of the Privy Council, by writing to the authority that made the statutory instrument or by attending at the head or central office of the authority or at such other place as may be designated by such authority, and requesting that a copy of the statutory instrument be provided.

SCRUTINY BY PARLIAMENT OF STATUTORY INSTRUMENTS

26. Every statutory instrument issued, made or established after the coming into force of this Act, other than an instrument the inspection of which and the obtaining of copies of which are precluded by any regulations made pursuant to paragraph (*d*) of section 27, shall stand permanently referred to any Committee of the House of Commons, of the Senate or of both Houses of Parliament that may be established for the purpose of reviewing and scrutinizing statutory instruments.

REGULATIONS

27. The Governor in Council may make regulations,

(*a*) exempting any proposed regulation or class of regulation from the application of subsection (1) of section 3 where that regulation or class of regulation would, if it were made, be exempted from the application of subsection (1) of section 5 or from the application of subsection (1) of section 11 as a regulation or class of regulation described in subparagraph (ii) of paragraph (*c*);

(*b*) exempting any class of regulation from the application of subsection (1) of section 5 where, in the opinion of the Governor in Council, the registration thereof is not reasonably practicable due to the number of regulations of that class;

(*c*) subject to any other Act of the Parliament of Canada, exempting from the application of subsection (1) of section 11

(i) any class of regulation that is exempted from the application of subsection (1) of section 5,

(ii) any regulation or class of regulation where the Governor in Council is satisfied that the regulation or class of regulation affects or is likely to affect only a limited number of persons and that reasonable steps have been or will be taken for the purpose of bringing the purport thereof to the notice of those persons affected or likely to be affected by it, or

(iii) any regulation or class of regulation where the Governor in Council is satisfied that the regulation or class of regulation is such that in the interest of international relations, national defence or security or federal-provincial relations it should not be published;

(*d*) precluding the inspection of and the obtaining of copies of

(i) any regulation or class of regulation that has been exempted from the application of subsection (1) of section 11 as a regulation described in subparagraph (iii) of paragraph (*c*),

(ii) any statutory instrument or class of statutory instrument other than a regulation, where the Governor in Council is satisfied that in the interest of international relations, national defence or security or federal-provincial relations the inspection thereof and the obtaining of copies thereof should be precluded, or

(iii) any statutory instrument or class of statutory instrument the inspection of which or the making of copies of which is not otherwise provided for by law, in respect of which the Governor in Council is satisfied that the inspection or making of copies thereof as provided for by this Act would, if it were not precluded by any regulation made under this section, result or be likely to result in injustice or undue hardship to any person or body affected thereby or in serious and unwarranted detriment to any such person or body in the matter or conduct of his or its affairs;

(*e*) prescribing the manner in which a regulation-making authority shall transmit copies of a regulation to the Clerk of the Privy Council;

(*f*) prescribing the form and manner in which any statutory instrument shall be registered and the form and manner in which and the period of time for which records of any statutory instrument shall be maintained;

(*g*) authorizing the Clerk of the Privy Council to direct or authorize publication in the *Canada Gazette* of any statutory instrument or other document, the publication of which, in the opinion of the Clerk of the Privy Council, is in the public interest;

(*h*) respecting the form and manner in which the *Canada Gazette* shall be published and prescribing the classes of documents that may be published therein;

(*i*) requiring any regulation-making authority to forward to the Clerk of the Privy Council such information relating to any regulations made by it that are exempted from the application of subsection (1) of section 11 as will enable the Clerk of the Privy Council to carry out the obligation imposed upon him by subsection (1) of section 14;

(*j*) respecting the form and manner in which any index of statutory instruments or any consolidation of regulations shall be prepared and published;

(*k*) prescribing the persons or classes of persons to whom copies of any consolidation of regulations may be delivered without charge and prescribing the charge that shall be paid by any other person for a copy of any such consolidation;

(*l*) prescribing the fee that shall be paid by any person for any inspection of a statutory instrument or for obtaining a copy thereof or the manner in which any such fee shall be determined; and

(*m*) prescribing any matter or thing that by this Act is to be prescribed.

AMENDMENTS TO INTERPRETATION ACT

28. (1) Subsection (2) of section 6 of the *Interpretation Act* is repealed and the following substituted therefor:

> "(2) Every enactment that is not expressed to come into force on a particular day shall be construed as coming into force
>
> (*a*) in the case of an Act, upon the expiration of the day immediately before the day the Act was enacted;
>
> (*b*) in the case of a regulation of a class that is not exempted from the application of subsection (1) of section 5 of the *Statutory Instruments Act*, upon the expiration of the day immediately before the day the regulation was registered pursuant to section 6 of that Act; and
>
> (*c*) in the case of a regulation of a class that is exempted from the application of subsection (1) of section 5 of the *Statutory Instruments Act*, upon the expiration of the day immediately before the day the regulation was made."

(2) Subsection (2) of section 23 of the said Act is repealed and the following substituted therefor:

> "(2) Words directing or empowering a Minister of the Crown to do an act or thing, or otherwise applying to him by his name of office, include a Minister acting for him, or, if the office is vacant, a Minister designated to act in the office by or under the authority of an order in council, and also his successors in the office, and his or their deputy, but nothing in this subsection shall be construed to authorize a deputy to exercise any authority conferred upon a Minister to make a regulation as defined in the *Statutory Instruments Act*."

(3) The said Act is further amended by adding thereto, immediately after section 28 thereof, the following section:

"28A. (1) In this Act,

(a) the expression "subject to affirmative resolution of Parliament", when used in relation to any regulation, means that such regulation shall be laid before Parliament within fifteen days after it is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting and shall not come into force unless and until it is affirmed by a resolution of both Houses of Parliament introduced and passed in accordance with the rules of those Houses;

(b) the expression "subject to affirmative resolution of the House of Commons", when used in relation to any regulation, means that such regulation shall be laid before the House of Commons within fifteen days after it is made or, if the House is not then sitting, on any of the first fifteen days next thereafter that the House is sitting and shall not come into force unless and until it is affirmed by a resolution of the House of Commons introduced and passed in accordance with the rules of that House;

(c) the expression "subject to negative resolution of Parliament", when used in relation to any regulation, means that such regulation shall be laid before Parliament within fifteen days after it is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting and may be annulled by a resolution of both Houses of Parliament introduced and passed in accordance with the rules of those Houses; and

(d) the expression "subject to negative resolution of the House of Commons", when used in relation to any regulation, means that such regulation shall be laid before the House of Commons within fifteen days after it is made or, if the House is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting and may be annulled by a resolution of the House of Commons introduced and passed in accordance with the rules of that House.

(2) Where a regulation is annulled by a resolution of Parliament or of the House of Commons, as the case may be, it shall be deemed to have been revoked on the day the resolution is passed and any law that was revoked or amended by the making of that regulation shall be deemed to be revived on the day the resolution is passed but the validity of any action taken or not taken in compliance with a regulation so deemed to have been revoked shall not be affected by the resolution."

CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

29. Section 3 of the *Canadian Bill of Rights* is repealed and the following substituted therefor:

"3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity."

30. Section 41* of the *Defence Production Act* is repealed and the following substituted therefor:

"41. (1) Every regulation, as defined in the *Statutory Instruments Act*, made under the authority of this Act shall be published in the *Canada Gazette* within thirty days after it is made.

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* Note explaining asterisk (*), on p. ix.

(2) Where a regulation has been published in the *Canada Gazette* pursuant to subsection (1), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within seven days of the day the regulation was published or, if Parliament is not then sitting, on any of the first seven days next thereafter that Parliament is sitting, praying that the regulation be revoked or amended shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made."

31. All that portion of section 5 of the *Export and Import Permits Act* following paragraph (*c*) thereof is repealed and the following substituted therefor:

"and where any goods are included in the list for the purpose of ensuring supply or distribution of goods subject to allocation by intergovernmental arrangement or for the purpose of implementing an intergovernmental arrangement or commitment, a statement of the effect or a summary of the arrangement or commitment, if it has not previously been laid before Parliament, shall be laid before Parliament not later than fifteen days after the Order of the Governor in Council including those goods in the list is published in the *Canada Gazette* pursuant to the *Statutory Instruments Act* or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting."

TRANSITIONAL

32. Where a regulation or an amendment thereto has not been published in the *Canada Gazette* and is of such a class that, if it were made after the coming into force of this Act, it would not be exempted pursuant to paragraph (*c*) of section 27 from the application of subsection (1) of section 11, it shall be deemed to be revoked on a day twelve months after the day on which this Act comes into force unless before that day it is transmitted to the Clerk of the Privy Council in both official languages, in which case the Clerk of the Privy Council shall, notwithstanding subsection (1) of section 7, register the regulation forthwith.

REVISED STATUTES OF CANADA, 1970

33. (1) In this section,

(*a*) "old law" means the statutes in force prior to the coming into force of the Revised Statutes of Canada, 1970 that are repealed and replaced by the Revised Statutes of Canada, 1970, and

(*b*) "new law" means the Revised Statutes of Canada, 1970.

(2) The amendments made by this Act to or in terms of the old law shall be deemed to have been made correspondingly to or in terms of the new law, effective on the day the new law comes into force or the day this Act comes into force, whichever is the later day; and, without limiting the powers of the Statute Revision Commission under *An Act respecting the Revised Statutes of Canada*, the Statute Revision Commission shall, in selecting Acts for inclusion in the supplement to the consolidation referred to in section 3 of that Act, include therein the amendments so made by this Act in the form in which those amendments are deemed by this section to have been made.

(3) A reference in this Act to any Act that is repealed and replaced by the Revised Statutes of Canada, 1970, or to any provision of such an Act, shall, after the coming into force of those Revised Statutes, be read as regards any transaction, matter or thing subsequent thereto as a reference to the corresponding Act or provision included in those Revised Statutes.

REPEAL

34. The *Regulations Act*, chapter 235 of the Revised Statutes of Canada, 1952 is repealed.

COMMENCEMENT

35. This Act shall come into force on a day to be fixed by proclamation.

SOR/71-592

STATUTORY INSTRUMENTS ACT

Statutory Instruments Regulations

P.C. 1971-2485

9 November, 1971

His Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to section 27 of the Statutory Instruments Act, is pleased hereby to make the annexed regulations respecting the examination, publication and scrutiny of regulations and other statutory instruments, effective January 1, 1972.

REGULATIONS RESPECTING THE EXAMINATION, PUBLICATION AND SCRUTINY OF REGULATIONS AND OTHER STATUTORY INSTRUMENTS

Short Title

1. These Regulations may be cited as the *Statutory Instruments Regulations*.

Interpretation

2. In these Regulations,

"Act" means the *Statutory Instruments Act*;

"exempt from examination" means exempt from the application of subsection 3(1) of the Act;

"exempt from publication" means exempt from the application of subsection 11(1) of the Act; and

"exempt from registration" means exempt from the application of subsection 5(1) of the Act.

Exemption from Examination

3. The following proposed regulations and classes of proposed regulations are exempt from examination:

(*a*) each proposed regulation that would, if it were made, be a regulation that would be exempt from registration; and

(*b*) each proposed regulation described in subsection 14(2), other than a proposed regulation described in paragraph (*d*) thereof, that would, if it were made, be a regulation that would be exempt from publication.

Transmission and Registration

4. (1) Subject to subsection (2), copies of every regulation transmitted to the Clerk of the Privy Council pursuant to subsection 5(1) of the Act shall be transmitted by personal service.

(2) Copies of a regulation may be transmitted to the Clerk of the Privy Council pursuant to subsection 5(1) of the Act by ordinary mail if they are mailed not later than the day next following the day on which the regulation is made.

5. Where a regulation is transmitted to the Clerk of the Privy Council pursuant to subsection 5(1) or section 32 of the Act, the Clerk of the Privy Council shall register the regulation

(*a*) by recording
(i) its name,
(ii) the name of the regulation-making authority,
(iii) the statutory or other authority pursuant to which it was made,
(iv) the date upon which it was made, and
(v) the date upon which it is registered; and
(*b*) by assigning to it the designation "S.O.R." followed by an appropriate number to distinguish it from any other regulation.

6. The Clerk of the Privy Council shall register every statutory instrument and other document, other than a regulation, that is published in the *Canada Gazette*
(*a*) by recording
(i) its name or the nature of its subject matter,
(ii) the name of the authority that issued, made or established it,
(iii) the statutory or other authority pursuant to which it was issued, made or established, and
(iv) the date upon which it was published; and
(*b*) by assigning to it an appropriate number to distinguish it from any other document that has been published in the *Canada Gazette*.

Exemption from Registration

7. The following classes of regulations, the registration of which, in the opinion of the Governor in Council, is not practicable due to the number of regulations of those classes, are hereby exempt from registration:
(*a*) regulations made under the authority of section 12 of *the National Defence Act;*
(*b*) rules, known as standing orders, made by the Commissioner of the Royal Canadian Mounted Police under the authority of subsection 21(2) of the *Royal Canadian Mounted Police Act;*
(*c*) "instructions to the trade" issued by the Canadian Wheat Board under the authority of the *Canadian Wheat Board Act*;
(*d*) regulations issued or made by the Canadian Grain Commission under the *Canada Grain Act* that
(i) are directed to a single person or body, or
(ii) apply to licensees for a period of time terminating not later than the end of the crop year with respect to which they were issued or made;
(*e*) directions made by safety officers under section 94 or 96 of the *Canada Labour Code*;
(*f*) orders and regulations issued or made by the Canadian Transport Commission established by the *National Transportation Act* that are directed to a single person or body; and
(*g*) by-laws, rules and regulations made under section 230 of the *Railway Act*, other than by-laws, rules and regulations respecting
(i) the smoking of tobacco, expectorating, and the commission of any nuisance in or upon trains, stations or other premises occupied by a railway company, or
(ii) the travelling upon or using of a railway by members of the public.

Retention of Statutory Instruments

8. (1) The Clerk of the Privy Council shall retain the original, or a copy certified to be a true copy, of each of the

official language versions of each regulation that is registered by him pursuant to section 6 or 32 of the Act.

(2) Where a regulation is exempt from registration, the regulation-making authority shall retain the original, or a copy certified to be a true copy, of each of the official language versions of that regulation.

Publication

9. The *Canada Gazette* shall continue to be published in two parts, namely, Part I and Part II.

10. The typography, style and format of Part I and Part II of the *Canada Gazette* shall be substantially similar to the typography, style and format of the public general Statutes of Canada.

11. (1) Subject to subsection (3), every statutory instrument, other than a regulation, and every other document that is required or authorized to be published in the *Canada Gazette* by or under the authority of the Act or any other Act of Parliament shall be published in Part I of the *Canada Gazette*.

(2) Every regulation, other than a regulation that is exempt from publication, shall be published in Part II of the *Canada Gazette*.

(3) The following classes of statutory instruments or other documents shall be published in Part II of the *Canada Gazette*:

(*a*) orders made by the Governor in Council under the *Public Service Rearrangement and Transfer of Duties Act*;

(*b*) orders made by the Governor in Council whereby any member of the Queen's Privy Council for Canada is designated to act as Minister for the purposes of any Act of Parliament;

(*c*) proclamations; and

(*d*) orders made under section 17 of the *Financial Administration Act* that are of continuing effect or apply to more than one person or body.

12. Part I of the *Canada Gazette* shall be published at least once every seven days and Part II thereof shall be published on at least the second and fourth Wednesday of each month.

Publication Directed or Authorized

13. The Clerk of the Privy Council may direct or authorize publication in either Part I or Part II of the *Canada Gazette* of any statutory instrument or other document the publication of which, in his opinion, is in the public interest unless the inspection of and the obtaining of copies of such statutory instrument have been precluded by section 21 or such document contains information, the disclosure of which is otherwise prohibited by law.

Exemption from Publication

14. (1) The following classes of regulations, being classes that are exempt from registration, are hereby exempt from publication:

(*a*) regulations made under the authority of section 12 of the *National Defence Act* other than regulations described in subsection (3) of this section;

(*b*) rules, known as standing orders, made by the Commissioner of the Royal Canadian Mounted Police under the authority of subsection 21(2) of the *Royal Canadian Mounted Police Act*;

(*c*) "instructions to the trade" issued by the Canadian Wheat Board under the authority of the *Canadian Wheat Board Act*;

(*d*) regulations issued or made by the Canadian Grain Commission under the *Canada Grain Act* that

(i) are directed to a single person or body, or

(ii) apply to licensees for a period of time terminating not later than the end of the crop year with respect to which they were made;

(*e*) directions made by safety officers under section 94 or 96 of the *Canada Labour Code*;

(*f*) orders and regulations issued or made by the Canadian Transport Commission established by the *National Transportation Act* that are directed to a single person or body; and

(*g*) by-laws, rules and regulations made under section 230 of the *Railway Act*, other than by-laws, rules and regulations respecting

(i) the smoking of tobacco, expectorating, and the commission of any nuisance in or upon trains, stations or other premises occupied by a railway company, or

(ii) the travelling upon or using of a railway by members of the public.

(2) The following regulations and classes of regulations, being regulations or classes of regulations that the Governor in Council is satisfied affect or are likely to affect only a limited number of persons and with respect to which the Governor in Council is satisfied that reasonable steps have been or will be taken for the purpose of bringing their purport to the notice of those persons affected or likely to be affected by them, are hereby exempt from publication:

(*a*) orders made by a person engaged or employed in the administration or enforcement of the *Fisheries Act* whereby any close time or fishing quota that has been fixed by regulations made under that Act is varied;

(*b*) regulations made by the Lieutenant-Governor of any province pursuant to section 13 of the *Prisons and Reformatories Act*;

(*c*) rules made by the Lieutenant-Governor of the Province of British Columbia pursuant to section 147 of the *Prisons and Reformatories Act*;

(*d*) orders or directions made by the Minister of Transport or the Deputy Minister of Transport with respect to the matters referred to in paragraph 6(1)(*l*) of the *Aeronautics Act*;

(*e*) by-laws made by the council of a band under section 81 of the *Indian Act*;

(*f*) notices issued by the Minister of Labour pursuant to subsection 106(1) of the *Canada Labour Code*;

(*g*) the *Regulations for the Transportation of Dangerous Commodities by Rail* made by the Canadian Transport Commission under section 296 of the *Railway Act*; and

(*h*) regulations made by the Canadian Transport Commission under paragraph 14(1)(*c*) of the *Aeronautics Act* or under paragraph 42(*e*) of the *National Transportation Act*.

(3) The following regulations and classes of regulations, being regulations and classes of regulations that, in the interest of international relations, national defence or security, the Governor in Council is satisfied should not be published, are hereby exempt from publication:

(*a*) regulations that bear a security classification and contain information in respect of

(i) the location or movement of military or civilian personnel of the Department of National Defence,

(ii) the administration or training of the Canadian Forces,

(iii) tactical or strategic operations or operational plans of the Canadian Forces,

(iv) the function of any unit or other element of the Canadian Forces, or

(v) materiel as defined in the *National Defence Act* including any article or object being designed, developed or produced with the intention that it will become materiel; and

(*b*) regulations that bear a national or international security classification and relate to Canada's role in the North Atlantic Treaty Organization or to any international agreement, one of the purposes of which is to provide for the defence or security of Canada.

Indexes

15. (1) Subject to subsection (2), the quarterly consolidated index of regulations shall contain in alphabetical order

(*a*) the name of each regulation required to be contained in the index specifying, with respect to each such regulation, the statutory or other authority pursuant to which it was made and, with respect to each such regulation and amendment thereto, the date upon which it was made, and where applicable, its registration number; and

(*b*) the name of each Act of Parliament pursuant to which regulations required to be contained in the index have been made and the names of all such regulations made under each such Act, specifying with respect to each such regulation and each amendent thereto the date upon which it was made and, where applicable, the date upon which it was registered, its registration number and a reference to the issue of the *Canada Gazette* in which it may be found or a reference to the regulation-making authority from which a copy may be obtained.

(2) The quarterly consolidated index of regulations shall refer to those regulations that are exempt from registration but are required to be contained in the index, by their name, where practicable, or by class specifying with respect to each such regulation or class of regulation the place where the regulation or a regulation of that class may be inspected and a copy thereof obtained.

16. The quarterly index of all documents, other than regulations, that have been published in the *Canada Gazette* shall contain in alphabetical order the name of each Act of Parliament under or in relation to which each such document has been issued, made or established, specifying with respect to each such document the issue of the *Canada Gazette* in which it may be found.

17. Where a regulation that is required to be contained in the quarterly consolidated index of regulations is exempt from publication and exempt from registration, the regulation-making authority shall, within seven days following the last day of each month, cause to be forwarded in writing to the Clerk of the Privy Council such of the following information as the Clerk of the Privy Council may require:

(*a*) the name of the regulation that is so exempt;
(*b*) the statutory or other authority pursuant to which the regulation was made;
(*c*) the date upon which the regulation and any amendment thereto was made; and
(*d*) the place where the regulation and any amendment thereto may be inspected and a copy thereof obtained.

Distribution of Canada Gazette

18. (1) A copy of Part I of the *Canada Gazette* shall be delivered without charge to each person who issues, makes or establishes a statutory instrument or other document that is published therein.

(2) A copy of Part II of the *Canada Gazette* shall, in addition to being provided to each Member of Parliament, be delivered without charge to those persons for the time being holding the offices or performing functions specified in Schedule I.

19. Copies of Part I and Part II of the *Canada Gazette* may be sold to any person upon payment of the appropriate charge therefor set out in Schedule II.

Inspection and Obtaining of Copies

20. Where any person requests that a statutory instrument be produced for inspection or that a copy thereof be provided to him, he shall pay the appropriate fee therefor set out in Schedule III.

Where Right to Inspect and Obtain Copies Precluded

21. (1) The inspection of and the obtaining of copies of regulations and classes of regulations that have been exempted from publication pursuant to subsection 14([illegible]) are hereby precluded.

(2) The inspection of and the obtaining of copies of the following statutory instruments and classes of statutory instruments, being statutory instruments or classes of statutory instruments the inspection of which and the obtaining of copies of which the Governor in Council is satisfied should be precluded in the interest of international relations or national defence or security, are hereby precluded:

(*a*) statutory instruments, other than regulations, that bear a security classification and contain information in respect of
  (i) the location or movement of military or civilian personnel of the Department of National Defence,
  (ii) the administration or training of the Canadian Forces,
  (iii) tactical or strategic operations or operational plans of the Canadian Forces,
  (iv) the function of any unit or other element of the Canadian Forces, or
  (v) materiel as defined in the *National Defence Act* including any article or object being designed, developed or produced with the intention that it will become materiel;
(*b*) statutory instruments, other than regulations, that bear a national or international security classification and relate to Canada's role in the North Atlantic Treaty Organization or to any international agreement, one of the purposes of which is to provide for the defence or security of Canada;

(*c*) certificates of citizenship granted or issued by the Secretary of State of Canada under the *Canadian Citizenship Act;*

(*d*) warrants issued under section 7 of the *Official Secrets Act* and orders issued under subsection 11(2) of that Act;

(*e*) statutory instruments, other than regulations, the disclosure of which would reveal the location or movement of any explosive or the location of any manufacturer of explosives; and

(*f*) licences, permits and other documents issued to any person by the Minister of Transport under the *Aeronautics Act* whereby that person is authorized to act as pilot-in-command, co-pilot, flight navigator or flight engineer of an aircraft.

(3) The inspection of and the obtaining of copies of the following statutory instruments and classes of statutory instruments, being statutory instruments or classes of statutory instruments in respect of which the Governor in Council is satisfied that the inspection or the making of copies thereof as provided for by the Act would, if it were not precluded by these Regulations, result or be likely to result in injustice or undue hardship to any person or body affected thereby or in serious and unwarranted detriment to any such person or body in the matter or conduct of his or its affairs, are hereby precluded:

(*a*) written warrants or orders for the arrest, detention, rejection or deportation of any person issued or made under the *Immigration Act* or under any regulation made thereunder;

(*b*) parole certificates and mandatory supervision certificates issued under section 12 of the *Parole Act* and warrants issued under section 16 or 18 of that Act;

(*c*) warrants made or issued under the *Penitentiary Act* whereby a person who has been sentenced or committed to a penitentiary is committed or transferred to any penitentiary in Canada;

(*d*) pardons granted by the Governor in Council under subsection 4(5) of the *Criminal Records Act* and any statutory instrument relating thereto;

(*e*) statutory instruments by which the salary or other remuneration of any person is fixed or approved by the Governor in Council except to the extent to which they provide for the fixing or approval thereof within a specified range;

(*f*) orders made pursuant to section 3 or 5 of the *Prisons and Reformatories Act;*

(*g*) warrants issued under section 45, 48, 56, 60, 96, 105, 115, 116, 117, 120, 132, 139, 152, 171 or 174 of the *Prisons and Reformatories Act;*

(*h*) interim prohibitory orders made under section 7 of the *Post Office Act* if those orders have not been declared final;

(*i*) warrants and permits granted under subsection 22(1) of the *Customs Act* and permits or certificates given under section 104 of that Act; and

(*j*) statutory instruments issued, made or established in the course of an inquiry under the *Combines Investigation Act* or an investigation ordered under section 114 of the *Canada Corporations Act.*

SCHEDULE I

1. The Governor General of Canada
2. Each Member of the Government of each of the provinces and each elected Member of the Yukon and Northwest Territorial councils
3. Each official of the Government of each of the provinces whose duties consist of the administration or interpretation of federal regulations, including registrars, clerks, prothonotaries and sheriffs of superior, county, district, surrogate, probate and other courts
4. Each member of the judiciary, including stipendiary and police magistrates
5. Each official of the Senate, of the House of Commons and of each department of the Government of Canada whose duties consist of the administration and interpretation of federal regulations
6. The Parliamentary Librarian
7. The National Librarian
8. The chief librarian of each provincial Legislature
9. The chief librarian of each university and of each law school in Canada
10. The chief librarian of each public library in Canada
11. The President of the Parliamentary Press Gallery
12. The Canadian ambassador to any country and the person in charge of a consular post in any country
13. The chief librarian of the United Nations
14. Members and officials of the Government of any country and persons holding positions in universities and other institutions in that country, if reciprocal arrangements exist for similar distribution without charge in Canada of the official gazette of that country

SCHEDULE II

Charges for obtaining copies of the Canada Gazette

1. Part I of the *Canada Gazette*	
(*a*) for residents of Canada, the United States and Mexico	
(i) for a single issue	$ .75
(ii) for annual subscription	25.00
(*b*) for residents of any country not specified in paragraph (*a*)	
(i) for a single issue	1.00
(ii) for annual subscription	35.00
2. Part II of the *Canada Gazette*	
(*a*) for residents of Canada, the United States and Mexico	
(i) for a single issue	1.25
(ii) for annual subscription	25.00
(*b*) for residents of any country not specified in paragraph (*a*)	
(i) for a single issue	1.50
(ii) for annual subscription	35.00

SCHEDULE III

Fees for inspection and obtaining of copies of statutory instruments

1. For inspection	
(*a*) of any statutory instrument issued, made or established more than five years before the request is made that it be produced for inspection	$1.00
(*b*) of any statutory instrument not described in paragraph (*a*)	.50
2. For obtaining copies of a statutory instrument	
(*a*) where only one copy requested	
(i) each of first 10 pages	.25
(ii) each page more than 10 pages	.15
(iii) minimum charge	1.00
(*b*) where more than [illegible] requested	
(ii) the fee set forth [illegible] paragraph (*a*) for the first copy plus ten cents for each page of additional copy	
(ii) minimum charge	1.00

26/1/72 *Canada Gazette Part II, Vol. 106, No. 2*

Registration No.	Date
SI/72-1	6 January, 1972

STATUTORY INSTRUMENTS ACT

Designation of place of inspection and sale

I, R. G. Robertson, Clerk of the Privy Council, pursuant to paragraphs 24(*a*) and 25(*a*) of the Statutory Instruments Act, do hereby designate room 1522 in the Varette Building, 130 Albert Street, Ottawa, as the place at which any statutory instrument that has been registered pursuant to section 6 or 32 of the said Act and that is not precluded from inspection or the obtaining of copies thereof by any regulations made under that Act or by any other Act of Parliament may be inspected or copies thereof obtained.

January 4, 1972.

R. G. ROBERTSON
Clerk of the Privy Council

12/4/72 *Canada Gazette Part II, Vol. 106, No. 7*

Registration
No. **Date**
SOR/72-94 **29 March, 1972**

STATUTORY INSTRUMENTS ACT

Statutory Instruments Regulations, amendment

P.C. 1972-589 28 March, 1972

His Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to section 27 of the Statutory Instruments Act, is pleased hereby to amend the Statutory Instruments Regulations made by Order in Council P.C. 1971-2485 of 9th November, 1971[1], in accordance with the Schedule hereto.

SCHEDULE

1. Subsection 21(3) of the *Statutory Instruments Regulations* is amended by deleting the word "and" at the end of paragraph (*i*) thereof, by adding the word "and" at the end of paragraph (*j*) thereof and by adding thereto the following paragraph:

> **"(*k*) directions issued or made by the Governor in Council following a recommendation made by the Employment Support Board under subsection 15(1) of the *Employment Support Act*."**

Registration
No. Date
SOR/72-527 5 December, 1972

STATUTORY INSTRUMENTS ACT

Statutory Instruments Regulations, amendment

P.C. 1972-2734 30 November, 1972

His Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to section 27 of the Statutory Instruments Act, is pleased hereby to amend the Statutory Instruments Regulations made by Order in Council P.C. 1971-2485 of 9th November, 1971[1], as amended[2], in accordance with the schedule hereto.

SCHEDULE

1. (1) Paragraph 14(2) (*e*) of the *Statutory Instruments Regulations* is revoked and the following substituted therefor:

"(*e*) by-laws made by the council of a band under section 81 or 83 of the *Indian Act;*"

(2) Subsection 14(3) of the said Regulations is amended by deleting the word "and" at the end of paragraph (*a*) thereof and by adding thereto the following paragraphs:

"(*c*) regulations relating to the operation and maintenance of material as defined in the *National Defence Act* that contain information provided by the government of a country other than Canada, or by a person having a proprietary interest therein, on the understanding that such information would not be disclosed except to the extent authorized by that government or person; and

(*d*) regulations made by the Governor in Council that apply to specific permits or leases issued or granted under the *Canada Oil and Gas Land Regulations* in areas off the coast of Canada declared by the Governor in Council to be areas concerning which negotiations with another country may be necessary or are in progress for the purpose of delimiting jurisdiction."

2. Subsection 21(3) of the said Regulations is amended by deleting the word "and" at the end of paragraph (*j*) thereof, by adding the word "and" at the end of paragraph (*k*) thereof and by adding thereto the following paragraph:

"(*l*) by-laws, rules and regulations issued or made under paragraph 230(*f*), (*g*) or (*h*) of the *Railway Act*, except to the extent that any such by-laws, rules or regulations apply to members of the public travelling upon or using a railway."

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[1] SOR/71-592, *Canada Gazette* Part II, Vol. 105, No. 22, November 24, 1971

[2] SOR/72-94, *Canada Gazette* Part II, Vol. 106, No. 7, April 12, 1972

[a]Statutory Instruments Act, S. C., 1970-71-72, c. 38 (marginal notes omitted.)

APPENDIX C

ESTIMATING NUMBER OF STATUTES IN FORCE, 1967-68

The "Table of Public Statutes, 1907 to 1967-68" contained 783 entries, exclusive of cross-references.[1] However, this figure had to be altered by ten factors in arriving at a more accurate count of the number of statutes in force.

First, any Acts passed before 1907, but excluded from the 1927 and 1952 Revised Statutes, were omitted from the Table. Second, a footnote reference to the Table stated that "in the Revised Statutes of Canada, 1927, and in the Statutes of Canada, from 1927 to 1952, there are a number of sections (or parts thereof) still in force";[2] these were not included in the Table. No attempt was made, in arriving at the revised total, to compensate for these two factors.

Third, some statutes passed since 1907 were doubtlessly "spent," but because they had not been repealed they were technically still in force and were included in the 1967-68 Table. It was impossible to determine which Acts belonged to this category and so none was excluded in the revised estimate.[3]

Fourth, some Acts listed in the Table consisted of a section or a group of sections from another Act. Those which were discovered were eliminated.[4] Fifth, five Acts which the Table stated had been found to be ultra vires or had expired were excluded in the revised figure.[5]

Sixth, about sixty statutes were noted as repealed. Where the notation was "Repealed and New" or "Repealed," followed by a year and chapter (twelve Acts), the Act was retained on the assumption that the new statute merely replaced the older one. Where, however, the notation "Repealed" was followed by a year, chapter, and section, the Act was excluded on the assumption that the repealing statute was listed elsewhere under a separate title.

Seventh, some Acts were included in the Table both as separate statutes and as amendments to other statutes, and a few were listed under two separate titles. Duplications which were discovered were eliminated from the revised total of statutes in force.[6]

Eighth, at least one Act was shown only as an amendment to another Act even though it was not so designated in the Statutes of Canada when it was passed.[7] How many other similar instances there may have been is unknown.

Ninth, the notation "for more details See Table of Public Statutes in the Statutes of Canada, 1952-53" followed the titles of fourteen Acts. In the 1952-53 Table six of these fourteen were shown as having been passed as thirty-two separate statutes. However, in making the present estimate the figure fourteen was used. For the sake of consistency this estimate also excluded the eleven Canadian National Railways (Branch Lines) Acts passed since 1952-53 even though they were listed individually in the 1967-68 Table. They may be subsumed under the Canadian National Railways (Branch Lines) Act shown in the 1967-68 Table as including branch lines statutes passed before 1952-53.

Tenth, at least one Act had presumably expired even though it was listed in the 1967-68 Table.[8] It was excluded from the new estimate.

After these ten factors were considered as indicated, the revised estimate of the number of statutes in force in 1967-68 was 679.

Footnotes

[1] S. C. 1967-68, pp. 317-341.

[2] S. C., 1967-68, p. 317(n). These are noted in Schedule A of Volume V (Supplement) of the 1952 Revised Statutes of Canada.

[3] These would include the World War One peace treaties, some trade agreement Acts (such as one in 1937 with Germany), the 1927 Diamond Jubilee of Confederation Act, and no doubt other statutes.

[4] Canada Labour Code Act which was part of the Canada Labour (Safety) Code Act (S. C., 1966-67, c. 62); Newfoundland National Park Act which was part of the National Parks Act (S. C., 1955, c. 37); Royal Canadian Mounted Police Pension Continuation Act which was part of the Royal Canadian Mounted Police Superannuation Act (S. C., 1959, c. 34); Canada-Norway Income Tax Convention Act, Canada-Ireland Income Tax Agreement Act, Canada-Trinidad and Tobago Income Tax Agreement Act, and Canada-United Kingdom Income Tax Agreement Act, all of which made up chapter 75 of the 1966-67 Statutes.

The following statutes were enacted within the Government Organization, 1966, Act (S. C., 1966-67, c. 25); Department of Manpower and Immigration Act, Department of Energy, Mines and Resources Act, Department of Forestry and Rural Development Act, Department of Indian Affairs and Northern Development Act, Department of the Registrar General Act, Department of the Solicitor General Act, and the Forestry Development and Research Act.

[5] Those found to be ultra vires were the Limitation of House of Work Act (S. C., 1935, c. 63), Minimum Wage Act (S. C., 1935, c. 44), Natural Products Marketing Act (S. C., 1934, c. 57), and the Weekly Day of Rest Act (S. C., 1935, c. 14). The Emergency Powers Act (R. S. C., 1952, c. 96) had expired.

[6] Those listed under more than one title were the Hungary and Turkey Treaty of Peace Act (S. C., 1922, c. 49) which was listed under "Hungary," "Turkey," and "Treaties of Peace"; Japan, Treaty of Peace Act (S. C., 1952, c. 50) which was also the Treaty of Peace (Japan) Act; the Trade Agreements Act (S. C., 1928, c. 50) which was listed also under both "Estonia" and "Hungary"; the Guatemala, Trade Agreement Act (S. C., 1938, c. 19) which was also the Canada-Guatemala Trade Agreement Act; the Poland Convention of Commerce Act (S. C., 1935, c. 51) which was also the Canada-Poland Convention of Commerce Act; the Corporations Act (R. S. C., 1952, c. 53) which was also the Canada Corporations Act; the Latvia Trade Agreement Act (S. C., 1928,c. 52) which was also the Estonia Trade Agreement Act; and the Treaties of Peace Act (S. C., 1919 [2nd], c. 30) which was also the Austria Treaty of Peace Act. This 1919 Treaties of Peace Act showed the Bulgaria Treaty of Peace Act (S. C., 1920, c. 4) and the Hungary and Turkey Treaty of Peace Act (S. C., 1922, c. 49) as amendments even though the

latter two statutes were not themselves so designated. They were also listed separately in the Table.

[7] The Regulations and Orders in Council Act (S. C., 1932, c. 12) was shown only as an amendment to S. C., 1928, c. 44, which had the same title.

[8] The British Columbia Coast Steamships Service Act (S. C., 1958, c. 7). Section 11 provided for the Act's termination "no later than the thirtieth sitting day of the next session of Parliament," and no amendment to the Act was shown in the Table.

APPENDIX D

HOUSE OF COMMONS SPECIAL COMMITTEE ON STATUTORY INSTRUMENTS, 1968-69: QUESTIONNAIRE[a]

1. With reference to the different types of subordinate legislation which come under the Administration of your Department or Agency

(a) Does your Department issue regulations, as defined by the *Regulations Act* R.S.C. 1952 c. 235, which are approved by the Governor in Council on the recommendations of your Minister? If so, about how many, including amendments, were issued during 1968?

(b) Does your Department issue regulations, as defined by the *Regulations Act* R.S.C. 1952 c. 235, which are made on the direct authority of your Minister? If so, about how many, including amendments, were issued during 1968?

(c) Does your Department issue regulations which are exempted from publication in the *Canada Gazette* by the *Regulations under Section 9 of the Act* SOR-54-569? If so, about how many, including amendments, were issued during 1968?

(d) Does your Department issue other rules, orders, instructions, not included within the terms of the *Regulations Act*—which affect the public? If so, about how many, including amendments, were issued during 1968?

(e) Does your Department issue other rules, orders or instructions, not included within the terms of the *Regulations Act*, which affect only your own Department? If so, about how many, including amendments, were issued during 1968?

In each case please list the statutory provisions (by title of statute, citation and section number) which confer power to make such subordinate legislation.

2. To what extent has the statutory power to make regulations conferred by legislation administered by your Department or Agency actually been used? Specifically, are there any such powers which have not been used or implemented? If so, please specify.

3. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that no regulations made under legislation administered by your Department or Agency would become law until:

(a) published in the Canada Gazette; or

(b) thirty days after publication in the Canada Gazette.

4. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that no regulations made under legislation administered by your Department or Agency would become law until approved by an affirmative resolution of the House of Commons within thirty days of being laid before the House—assuming for the purpose of your answer, that the regulation is laid within fifteen days of being published?

5. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that regulations made under legislation administered by your Department or Agency would become law when made but would be subject to being annulled by a resolution of the House of Commons within forty days of being laid before the House—assuming them to be laid within fifteen days of being made?

6. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned)

of a statutory requirement that regulations made under legislation administered by your Department or Agency would be subject to scrutiny by a parliamentary committee which did not have the power to amend them?

NOTE: It is appreciated that all regulations do not stand on the same footing as far as answering questions 3, 4, 5 and 6 are concerned. Therefore, it is expected that the answer will refer to particular enabling sections and actual regulations.

7. Are there any regulations made under legislation administered by your Department or Agency which are of such a long-standing or durable nature that their terms could be inserted into the enabling statute? Are there any such regulations which, for any reason, in your view, should have been enacted as part of the statute?

8. Are there any provisions in legislation administered by your Department or Agency enabling regulations to be made which, in your view, are too broad, in the sense that the nature and scope of your authority to make regulations thereunder is ill-defined or uncertain or that insufficient standards or guide-lines are set forth therein? If so, please specify.

9. Are there any provisions in statutes administered by your Department or Agency enabling regulations to be made which, in your view, are too narrow, in the sense that they do not provide enough scope to make regulations to deal effectively with the problems in the areas affected? If so, please specify.

10. Does your Department or Agency issue documents in the nature of policy statements or position papers which are used by your Department or Agency to implement policies under legislation administered by it? If so, please specify. If so, what steps are taken to bring such documents to the attention of interested or affected persons?

11. Does your Department or Agency consult interested or affected persons when preparing regulations so as to obtain their views with respect to the scope and content of the regulations? If so, please advise as to the procedures used, formal or otherwise, for obtaining or implementing this consultation.

12. Are parliamentary committee ever consulted in the formulation of your regulations?

13. Who specifically within your Department or Agency formulates the policies found in your regulations?

14. Who drafts your regulations—a departmental solicitor, a Department of Justice solicitor, a departmental officer who is not legally trained, or some other person? If there are variations in the practice in this respect under different statutes, please specify.

15. Are your regulations drafted initially in French or in English—or simultaneously in both languages? If they are drafted first in one language at what point in the drafting process is the translation made to put them into the other language? How much delay results from the necessity of translation?

16. What circumstances do you envisage would make it necessary to extend the time for publication of a regulation under section 6(2) of the Regulations Act, R.S.C. 1952, c. 235?

17. Is there any reason why regulations could not be published within fifteen days of being made?

18. What circumstances would, in your view, justify the exemption from publication of a regulation?

19. Please list the titles, indicating briefly the subject matter thereof, of all regulations made under legislation administered by your Department or Agency which have not been transmitted to the Clerk of the Privy Council, recorded by him, published in the Canada Gazette or laid before the House in accordance with Regulations Act, Supra,—or have not been subjected to any one of these four processes?

20. Have any steps been taken to index or tabulate the regulations referred to in question 19, to publish them in some place other than the Canada Gazette, or to advise interested or affected persons, or the public, of their existence? If so, please specify the steps taken with respect to each such regulation.

21. How would a person, both inside and outside of your Department or Agency, satisfy himself as to the authenticity of a regulation not transmitted, recorded, published or laid before the House in accordance with the Regulations Act, *supra*?

22. How would you prove the authenticity of such a regulation in a court of law, should this be necessary?

23. Please advise as to any suggestions or submissions which you may have respecting the improvement of the mode or process of conferring the power to make regulations and the preparation and bringing into effect of regulations.

[a] From Statutory Instruments Committee, *Minutes*, April 22, 1969, pp. 46-47.

APPENDIX E

SUMMARY OF DEBATES DURING THE 1969-70 SESSION

Table of Contents

Page

A. Debate of bills containing enabling clauses 294
- 1. Bills which became law 294
    - (a) bills introduced first in the Senate 294
    - (b) bills introduced first in the House of Commons . . . 297
        - (i) comment in the Senate only 298
        - (ii) comment in the House of Commons only 298
        - (iii) comment in both houses 302

- 2. Bills which did not become law 319

B. Other opportunities to comment upon subordinate legislation and its control 326
- 1. Debate of bills which contained no enabling clauses . . . 327
    - (a) bills which became law 327
    - (b) bills which did not become law 330

- 2. Other opportunities within the House of Commons 333
    - (a) Throne speech debate and budget debate 333
    - (b) questions 334
        - (i) oral questions 334
        - (ii) questions on the Order Paper 335
    - (c) Standing Order 26 336
    - (d) Standing Order 43 336
    - (e) notices of motion for the production of papers . . . 337
    - (f) private members' business 339
    - (g) allotted days 342
    - (h) the estimates 344
        - (i) main estimates for 1970-71 344
        - (ii) supplementary estimates for 1969-70 346
    - (i) ten o'clock adjournment 347
    - (j) other committee studies 348
    - (k) other occasions 351

- 3. Other opportunities within the Senate 353

A. Debate of Bills Containing Enabling Clauses

1. Bills Which Became Law

(a) Bills introduced in the Senate

Ten of the fifty-one bills which delegated authority and became law were first introduced in the Senate. While they were before that House three of them provoked no discussion related to delegation, its use or control.[1]

Four others occasioned only an uncritical question or comment.[2] For example, when Senator Smith moved second reading of the Quarantine Bill, he said:

> In designing the present bill, note has been taken of the fact that the Quarantine Act, to be repealed by this bill, consists almost entirely of regulation-making sections. Care has been taken to include in the basic legislation itself in the new draft every possible provision for the implementation of the measure, leaving to subordinate legislation, in the form of regulations, only the remaining minimum which upon consideration is deemed essential.

Revision of existing quarantine regulations should, he added, permit the confining of subordinate legislation "to a fraction of its present extent."[3] Senator Sullivan (Cons.) remarked that this was "a great improvement over previous legislation."[4] When the Trust Companies Bill was before the Banking, Trade and Commerce Committee, Senator John Connolly (Lib.) asked if the parent Act delegated regulation-making power.[5] During that Committee's consideration of the Oil and Gas Production and Conservation Bill, Senator Hollett (Cons.) said that he hoped the public would be informed about the regulations, and Senator John Connolly supposed that industry would be consulted when regulations were being made.[6]

Senator Grosart (Cons.), who throughout the session was one of few severe Senate critics of delegation, was extremely critical of two other bills. During the second reading debate of the Radiation Emitting Devices Bill he suggested that, because the devices to be controlled would not be known before the regulations were known:

> Perhaps in committee we should tell the officials that we will not pass this bill until they show us the regulations, since it is only when they produce the regulations that we will know what power they are asking us to give . . . . The point I am making is that, if we pass the bill as it stands we are saying to the officials: "You decide what the substance of this bill is, we will pass it and you tell us some time later what we passed."
>
> . . . .
>
> I should like to see it become a principle in this chamber that in this kind of bill we will not grant this wide authority at any time unless we see the regulations. Surely it makes sense for a legislative chamber to say it wants to see the results of what it is being asked to do.[7]

Sullivan wanted this question answered in committee.[8] Senator Muriel Fergusson, who moved second reading, acknowledged that "perhaps Sen. Grosart has a point," but she defended the practise of passing legislation before the regulations are made as "following what has been customary in the past."[9] At the committee stage, Grosart extended his tirade to include the related Hazardous Products Act which is "an outrageous act--it is one that permits the minister to repeal the act. It is the first time in the history of legislation that we have had that situation, but we have it now."[10] When the Textile Labelling Bill came before the Senate, Grosart merely asked Senator Lazarus Phillips, who had moved second reading, "Is the Honourable Senator saying that we cannot understand this bill until we see the regulations?"[11]

The amendment of one Senate bill related to delegated power.

The change, made to the Canada Shipping Act (Pilotage) Bill in committee, enabled the cabinet to terminate certain orders and by-laws earlier than the stated expiration date.[12] There was no debate.

When these ten bills got to the House of Commons, the enabling clauses received even less attention than they did in the Senate. There was no relevant discussion of six of them except the occasional mention of the regulation-making power by the Government sponsor.[13]

Only mild opposition was expressed to two others. The Honourable Marcel Lambert spoke of "ministerial discretion piled on to the ministerial discretion" when the Canadian and British Insurance Companies Bill was in committee.[14] During the second reading debate of the Oil and Gas Production and Conservation Bill, Mr. Harding (N. D. P.) wanted to know why the Government often took so long to produce regulations, and Mr. Barnett (N. D. P.) suggested that because of this delay the Government should immediately "make clear the substance of the regulations which it intends to enforce."[15]

The absence of regulations was noted also during committee discussion of the Quarantine Bill.[16] Liberal backbencher K. Robinson suggested that "we just have to go by faith and by God, and trust that all the regulations are going to be in keeping with the spirit and content of the Bill." Chairman Isabelle replied, "that is the way to live." Barnett believed that "we do have ways of raising Cain if we think they are not" consistent with the Bill, but he did not volunteer the nature of these weapons.

The lack of parliamentary control of subordinate legislation was attacked only twice--both times by Mr. Baldwin (Cons.), clearly the most vociferous Commons critic of delegated power. During the debate on second reading of the Quarantine Bill, he suggested that

> this bill, like so many others this session, provides that the usual wide discretionary powers be given to the Governor in Council to act by order in council, by regulation or by decree. I call this to the attention of the House as I have done in the case of so many bills in the past.

He continued that, if governments are to be permitted to legislate by order-in-council, "it is imperative that Parliament be provided with the means of checking these regulations." After charging that Parliament is continually eroding citizens' rights by delegating powers to the cabinet, he called upon the Government to bring in legislation to implement the recommendations of the Special Committee on Statutory Instruments.[17]

Baldwin made similar comments during debate of the Canada Shipping Act (Pilotage) Bill, but by then he was "glad that after prodding, pushing and shoving," the Government had announced its plans to implement most of the recommendations of the Statutory Instruments Committee.[18]

(b) Bills introduced in the House of Commons

Forty-one bills which became law and delegated power were first introduced in the House of Commons. Of these, eighteen provoked either no comment relevant to this study, only passing reference by the bills' sponsors in the House or in committee, or insignificant comment by the opposition. Of the remaining twenty-three bills, one sparked comment only in the Senate, nine only in the House of Commons, and thirteen in both houses.

(i) Comment in the Senate only

The Saltfish Bill stimulated remarks only during the third reading debate. In noting that this Bill delegated regulation-making authority, Senator Kinley (Lib.) remarked that other senators had periodically commented "on the dangers inherent in delegated legislation," and "how it could detract from the prominence of parliament."[19]

(ii) Comment in the House of Commons only

Most of the remarks made in relation to the enabling clauses of these nine bills were only mildly critical. During the second reading debate of the Expo Winding Up Bill, Conservatives Harkness, Crouse, and Aiken complained that the Minister of Industry, Trade and Commerce (Mr. Pépin) was seeking a blank cheque to dispose of the assets of the Corporation for the 1967 World Exhibition.[20] Mr. Crouse wanted the Minister to "give us some indication at an early date of the manner in which he plans to wield this almost totalitarian power placed in his hands by this bill," and Mr. Aiken suggested that the Minister be required to report to Parliament on the use of this power.

When the Canadian National Railways Financing and Guarantee Bill was before the House for second reading, Conservatives McIntosh, Marcel Lambert, and McCleave criticized the loan-making power delegated to the Minister of Finance inasmuch as loans would become grants if the Railway's annual deficits were to continue.[21]

In Committee of the Whole, Mr. Howe (Cons.) questioned the advisability of allowing the Minister of Agriculture to define the term "agricultural product" for the purpose of the Agricultural Products

Cooperative Marketing Bill,[22] and Mr. Danforth (Cons.) was

> suspicious of the fine print in bills which says "and other regulations as may be prescribed from time to time by the Governor in Council." These regulations that are prescribed from time to time, mostly when Parliament is not sitting, cause great concern to many members on this side of the House."[23]

The recurring complaint that regulations were not available when legislation was before Parliament was voiced by Mr. Skoberg (N. D. P.) in committee discussion of the Railway Bill. That Bill extended the regulation-making power of the Canadian Transport Commission by removing the exclusion of telecommunication companies from the jurisdiction of the parent Railway Act. He said "it is damn stupid of us to vote on a Bill when we do not know the regulations because the regulations make the Bill. The Bill does not make the regulations."[24] The Honourable Eric Kierans, Postmaster General and Minister of Communications, admitted that this was "a very valid point with respect, I suppose, to most bills. I do not see any particular way around it."[25] Mr. Benjamin (N. D. P.) then asked if "it would be practical, possible or worthwhile" that the Minister "go over" with the committee any new regulations under this Bill or indeed other bills.[26] Mr. Kierans had "no objection . . . at all" because "I consider the drafting of the regulations to be almost as vital as the Bill itself."[27]

The Supply Bill covering supplementary estimates "B" for 1969-70 was severely criticized by Baldwin during the second reading debate. The Government, he said, was "attempting to use a vote on the supplementary estimates for the purpose of enacting what are in fact legislative proposals." This Vote, he maintained,

> purports to give the Governor in Council the right to enact legislation. I have objected in this House on many occasions to the idea of improper legislative items giving to various bodies the right to enact regulations which will grant very considerable powers, but when the government attempts to do this through a vote in the supplementary estimates it is even worse.

He added that if "Parliament had the machinery which was requested in October when the Committee on Statutory Instruments filed its report, . . . I should feel much easier."[28] Messrs. Ritchie (Cons.) and Hales (Cons.), also, opposed delegation by means of a supply bill.[29] Other speakers asked when the regulations referred to in the Vote would be announced.

During the second reading debate of the Criminal Records Bill, Aiken, and Frank Howard (N. D. P.), expressed concern about allowing the Governor-in-Council to revoke the pardon of a person who in the Governor's opinion "is no longer of good conduct."[30] The matter was not pursued then or in the Committee on Justice and Legal Affairs.

One of the few comments relating to clauses containing the discretionary "may" was made by Mr. Murphy (Lib.) when the Bill was in committee. Why should Section 6(1) provide that the minister "may" require that the judicial records of a person who has been granted a pardon be delivered to the Commissioner of the R. C. M. P.?[31] Solicitor General McIlraith replied that there was no intention that he would not call in the records.[32] There was no more discussion.

Mr. Comeau (Cons.) had a similar inquiry when the motion for second reading of the Nuclear Liability Bill was debated. The minister, he asserted, should not have the discretion implied in Section 28 to refuse payment of a claim awarded by the Nuclear Damage Claims Commission.[33] He pursued his criticism three times in committee,[34] and received identical replies from Mr. Orange (Parliamentary Secretary to the Minister of Energy, Mines and Resources) and E. R. Olson of the Department of Justice. The Minister could, presumably, refuse to pay a claim, but the purpose of the permissive "may" was rather to grant the authority to make payments.[35]

Section 34(4) of this Bill was also subject to Comeau's criticism, both during second reading debate and in committee. The Section authorized the Governor-in-Council to modify Part I of the Bill ("Liability for Nuclear Incidents") when it was considered necessary in order to implement an agreement with another country providing compensation for nuclear damage.[36] In committee, Comeau said:

> Well, Mr. Chairman, there are quite a few pieces of legislation that we have passed this year that give quite far-reaching powers to the Governor in Council, and this is the thing that bothers me. I would not want the Minister . . . to abuse this thing because I feel quite strongly that he could easily come back to Parliament and take the necessary action through Parliament rather than through Governor in Council.

Orange admitted that Comeau's was a "natural concern."

> However, in the view of the way international agreements are arrived at, I just have not got the solution to how you come back to Parliament to approve every treaty, and this is a real problem, I think, that we face as parliamentarians.[37]

What the Parliamentary Secretary overlooked, however, was the fact that the criticism was directed at the method of implementing the agreement, not its ratification which clearly is an executive function. Section 34(4) was merely a convenience for the Government. There was no discussion of the privative clause (s. 26) although Senator Lang in moving second reading noted that the clause would in effect be repealed by the Federal Court Bill, "in conformity with today's new philosophy" as reflected in the Law Reform Commission and Federal Court bills and the report of the Commons Statutory Instruments Committee.[38]

Seven bills passed during the session authorized the Governor-in-Council to designate the minister responsible for administering legislation. Although there was no questioning of this procedure per se, Barnett, in committee, sought the reason for a "rather unusual clause" (Section 26 of the Arctic Waters Pollution Prevention Bill) which authorized the Governor-in-Council to delegate by order much of his authority to any minister. Upon the making of this order, the title of the minister would be read in place of "the Governor in Council" in the relevant sections of the Bill.[39] A. D. Hunt, Acting Assistant Deputy Minister of Indian Affairs and Northern Development, replied that the flexibility was desired inasmuch as the allocation of responsibilities among departments with respect to northern development was still under discussion.[40]

One-third of the bills passed during the session left their effective dates to be determined by proclamation of the Governor-in-Council. The reason usually given by the Government was that the necessary regulations and administrative machinery would not be ready when the Royal Assent was given. One of the few expressions of concern about this discretion was voiced by Mr. McGrath (Cons.) during second reading debate of the Bills of Exchange Bill.[41]

(iii) Comment in both houses

The enabling sections of thirteen House of Commons bills were the subject of some discussion in both houses. In seven cases the comments were fairly critical, but in only three were they lengthy--the Law Reform Commission Bill, the Canada Water Bill, and the bill amending the Yukon Act, Northwest Territories Act, and Territorial Lands Act.[42]

In moving second reading of the Law Reform Commission Bill, Justice Minister Turner suggested that:

> I should think it is incumbent upon the commission at an early stage to examine public administrative laws in Canada, the working of federal boards, commissions and tribunals, as well as the remedies of the citizen by way of administrative review and judicial review. I think this House, in a report of the committee . . . studying statutory instruments, has shown how Parliament might better review some of its administrative procedures. I think we have to buttress this on a local and national basis.[43]

In his response, Baldwin said that the recommendations of the Statutory Instruments Committee--"a good committee, non-partisan and objective, a committee that made a united and unanimous report"--should already have been implemented or at least discussed in Parliament. He summarized some of these recommendations, but feared that unless Government proposals were announced soon, the recommendations might well "wither on the vine."[44]

Mr. Bigg (Cons.), "alarmed at the sweeping powers given in this bill to a minister of the Crown," believed that Commons committees "should have a great deal to do in seeing that the intentions of Parliament, when we put something into statute form, are carried out."[45]

Mr. Woolliams (Cons.) asked whether the Law Reform Commission would "have the right to review all orders in council that this institution gives the executive the right to pass." Mr. Turner replied that the terms of reference were sufficiently wide, and that "if this House under government initiative is wise enough to implement some of the committee's recommendations in the report on statutory instruments, . . . we can achieve this not only by way of judicial review but also by way of parliamentary review."[46]

The Committee on Justice and Legal Affairs accepted an amendment suggested by Mr. Chappell (Lib.) requiring the Minister to include in his reports to Parliament any programs proposed by the Commission which he had not approved.[47] This would draw to Parliament's attention one use of the Minister's discretion. The only other relevant comment in Committee was McCleave's query as to when the Bill might be proclaimed.[48]

In the upper House, Senator Langlois (Lib.) asked the same question raised by Woolliams in the Commons,[49] but Senator Martin had a different reply: the suggestion, he thought, was neither correct nor appropriate; Parliament was the body to scrutinize.[50] Grosart maintained that there is a distinction between the examination of subordinate legislation already passed, and the theory behind the delegation of power. He wanted the Law Reform Commission to "examine the law-making authority which has resulted in great abuse."[51] Senator Flynn (Cons.) noted Langlois' "interesting" suggestion, and commented upon the study of statutory instruments to be undertaken by the Committee on Legal and Constitutional Affairs.[52]

When the Water Bill was before Parliament, no one questioned the need for pollution control. However, there was much criticism of the broad delegations of power to the cabinet and the Minister of Energy, Mines and Resources. Aiken led the attack in the Commons Committee on National Resources and Public Works:

> We are passing absolutely a blank cheque in passing Part 3 of this Bill. We are leaving it to somebody, I do not know to whom, to pass regulations, certainly the Governor General is not going to sit down himself and figure them out. I have to then ask who is?[53]

He then proposed an amendment requiring the Minister to consult with industry, provincial governments, and other departments of the Government of Canada which would be affected, before recommending regulations to the Governor-in-Council. He said:

> We cannot control life beyond the grave; when this Committee is finished with the Bill it is gone, and after that it is only in the hands of the Minister of the department. There will be other ministers and this Bill will be in effect a long time, and I think Parliament should not give a free hand to the government in this matter without assuring there will be proper consultations.[54]

While Energy, Mines and Resources Minister Greene admitted that the consultations called for in the amendment would be normal procedure,[55] he would not agree to an amendment, especially one which required interdepartmental consultation:

> The theory of our system of government is based on the unity of the Crown and thence the solidarity of Cabinet which is an aspect of the unity of the Crown, and when the government acts, whether by a single minister or by Order in Council it is the action of all collectively. If they consult or if they do not, it does not matter. The action of the Crown through the executive is the action of all, the collective responsibility of Cabinet.[56]

He added that "interdepartmental procedure . . . is a matter of Cabinet secrecy."[57] Greene did not, however, explain why he would not favour an amendment requiring consultation with industry and provincial governments. (An amendment which Aiken moved at the report stage, and which included only these two items, was defeated after little discussion and no comment by the Minister.)[58]

Harding, also, was critical in committee of Part III's delegation:

> I think there are a lot of questions that we should be asking the Minister on these regulations before we make any move. We want to know where we are going to go. So far, the way the legislation is lined up anything can happen and I think we are entitled to the information on the regulations. The Liberals might have it, but by gosh the rest of the Committee members do not have it.[59]

Liberal backbenchers Hymmen and Foster supported Greene. "I favour the procedure introduced by the Minister," said Hymmen; "the way it is drafted will implement what we want to do on nutrients in the future, and allow the Department to write regulations, and the Governor in Council to write regulations," said Foster.[60]

Of less concern to Committee members was Comeau's amendment requiring the publication of water quality management plans one month before their approval.[61] Attempts by New Democrats Harding and Mrs. MacInnis to replace "may" with "shall" in three places, were not controversial.[62] According to P. M. Ollivier (Parliamentary Counsel and Law Clerk, Law Branch, House of Commons), the distinction between the two terms is not one between mere permission and obligation: "I think when you say 'may' . . . it does create an obligation."[63]

When the Bill reached third reading, Aiken again lamented the fact that "the entire control and management of our resources . . . [are] in the hands of the minister and his department," but this time he also criticized the absence of "further review by Parliament or its committees."[64] However, the Speaker ruled out of order, his amendment to return the Bill to the Committee

> with instructions to amend it by providing for the continuing scrutiny of the management of Canada's water resources by a committee of the House, with a permanent staff of one or more persons to assist it, and that for the purpose of any additional expenditure, the committee request a further recommendation by His Excellency the Governor General.[65]

In the Senate Standing Committee on Health, Welfare and Science, representatives of industry were concerned that no appeal could be made under the Bill against regulations banning nutrients.[66] Mr. Greene again promised, however, that no substance would be banned as a nutrient without industry being given full knowledge and an opportunity to present its case.[67] Chairman Lamontagne asked Senator Martin whether,

> as a result of the discussion we have had in the Senate for about three weeks on statutory instruments and regulations, . . . it would be possible at some stage in the future for the Senate committee responsible for this to review the regulations that will be promulgated by the minister on this specific issue.[68]

Both Martin and Greene thought this would be feasible.[69]

Senator Cameron (Ind. Lib.) stated that, so far as was practical, "the time has come when we must insist that the regulations used to implement any bill are published with the bill" so that Parliament and the public might be more informed.[70] He hoped that such a recommendation would be made by the Committee on Legal and Constitutional Affairs following its study of statutory instruments.[71] He also noted that the Health, Welfare and Science Committee was

> publicly on record that any concerned person--public body or private body--who feels disadvantaged through the application of regulations, has the right to come before . . . [that Committee]. That is an excellent precedent to establish, something that has not been done before.[72]

Criticism of the Bill to amend the Yukon Act, Northwest Territories Act, and Territorial Lands Act was directed primarily at the fact that the land use regulations (authorized by Section 24) which would be made under the Territorial Lands Act were not available for discussion even though their substance had already been determined. During the Commons debate on second reading, Frank Howard asserted that the Minister (Mr. Chrétien) had already announced outside of Parliament that the regulations had in fact been drafted.

> There is no point coming before Parliament and asking for an alteration to the Territorial Lands Act which conceives of having land use regulations. The bill is so sparse in its information about this matter that the full force the minister hopes for will be contained in the regulations. It is unkind to Parliament for the minister to say that the full force of what is to be done will be in the regulations. The minister says, "I have the regulations developed. They are here, but I am not going to tell you what they are." I think it is incumbent upon the minister to disclose those regulations before he asks Parliament to give him a blanket type of endorsement. The minister shakes his head.[73]

To Mr. Turner's comment that "it would be very presumptuous for the minister to state the regulations before Parliament adopted the enabling statute giving birth to those regulations," Howard responded that "it is even more presumptuous" for the Minister to make such a statement outside of Parliament.[74] Baldwin added that the Justice Minister's remark "is utter nonsense. We have had too much of it." The regulations should be produced "as an inducement to persuade members that this is a good bill with good clauses in it."[75] However, Orange, Liberal member for the Northwest Territories (and Parliamentary Secretary to the Minister of Energy, Mines and Resources) was not concerned: "If we read the proposed amendments in this bill we will see that the regulations should do the kind of job that all of us expect."[76]

The battle continued in the Committee on Indian Affairs and Northern Development. The Honourable Jean Chrétien told Mr. Nielsen, Conservative member for the Yukon Territory, that he knew precisely what the regulations would be and that when they were ready he "would be delighted to refer . . . [them] to the Committee to have a look at them."[77] Nielsen was not satisfied: Inasmuch as the Minister had already discussed the substance of the regulations publicly, "even the thoughts as they have been developed thus far by the officials of the Department" should be presented to the Committee.[78] Barnett, also, wanted "detailed answers to the question of this management . . . of 40 per cent of Canada by Order in Council," although he agreed that "obviously a lot of this will have to be dealt with by regulation rather than being spelled out in detail in the bill."[79]

At this point, the Minister said that his officials "will be delighted" to discuss the ideas which had been expressed outside the House, and "will be delighted to consider the Committee's views when the regulations are being finalized."[80]

Although Chrétien at first refused his assurance that proposed regulations would be discussed with the territorial councils, the Committee later accepted an amendment proposed by Nielsen requiring consultation with the councils or, if this were not practicable, with such members as was possible.[81]

In the form introduced by the Government, this Bill did not alter the cabinet's authority to dissolve the two territorial councils, but it did extend the maximum life of a council from three to four years. Nevertheless, criticism was directed at the power to dissolve, and it led to two amendments in Committee making the exercise of this power contingent upon prior consultation with the council concerned or, if this were not practicable, with such members as was possible.[82]

Senators were silent on the issue which had occupied so much time in the House of Commons, and only the power of dissolution was criticized. Senator Aseltine (Cons.), who objected "strongly," said that he agreed "substantially" with opposition expressed in the other place.[83]

In addition to the three bills just discussed, four others were the subject of relevant comment, generally critical, in both houses.[84] During second reading debate of the Motor Vehicles Safety Bill, Transport Minister Donald Jamieson took the unique step of presenting before the House a partial list of standards which his Department would implement as soon as the Bill became law.[85] The only severe criticism came in committee when Howe suggested that these standards, and others still to be made, should be included in the legislation. The Act could be returned to the committee once or twice a year, he thought, "so that we could review it if there were new safety regulations brought forward from somebody."[86]

> There is so much government legislation these days that nothing is spelled out in the bill. We just pass these things and never see them again. The Governor in Council, that great executive body that we have sitting upstairs there, can make regulations any time. The deputy minister here [not in this Bill] can make regulations. They do not have to come back to the House any more. I object to so much legislation going through this House

> of Commons today.
>
> The Houses of Parliament of Canada are getting to be just a letterhead to pass these kinds of things so that the executive can make their own rules.[87]

Mr. Jamieson responded that flexibility to change regulations was "certainly the most defensible use of the regulatory power that there could possibly be."[88] Mr. Pringle (Lib.) agreed, commenting that "this is nothing new in the House of Commons." He also anticipated a Government recommendation that "all regulations for all bills be referred to the appropriate committees for study once a year, similar to the way the Estimates are being placed before the committees at the present time."[89]

Much of the criticism was defused by the Minister's reminder that proposed regulations had to be published in the Canada Gazette so that interested persons, including this committee if it so desired, could make representations to the Minister.[90] Mr. Mather (N. D. P.) thought that wider publicity was required "such as the daily press, or some advertisement in the media."[91] Pringle supported this suggestion, and Mr. Fortier (Counsel, Department of Transport) saw no objection although he wondered if it would be necessary to publish in newspapers "from one end of this country to the other."[92] Mather indicated that he would be satisfied "if we can make a recommendation to the Minister for greater publicity of these recommendations." The clause carried without amendment.[93]

The sole comment in the upper House was made by Senator Edgar Fournier (Cons.) in committee: "Are we voting for a blind bill?" Mr. Fortier explained that volume and the need for flexibility made impossible the inclusion of regulations in the Bill.[94]

During Commons consideration of the Criminal Code (Hate Propaganda) Bill, Conservatives Woolliams and McQuaid criticized the discretion granted the Attorney General to determine whether proceedings for an offence (advocating genocide, or inciting or promoting hatred against identifiable groups) would be instituted. According to Mr. McQuaid:

> Attorneys General are subject to all the vagaries of politics and, if they can avoid it, do not like to cause ill will or discontent among those they perhaps later on will have to turn to in search of support at the polls.[95]

In Woolliams' view,

> Politicians have been known to bend with the wind. This means it is possible there will be one law for the French and one for the English, one for the Jews and one for the Arabs, one for the Catholics and one for the Protestants.[96]

Mr. Brewin (N. D. P.), however, defended the discretion on the grounds that it afforded protection against frivolous prosecution.[97] Senator O'Leary shared the fears expressed by his fellow Conservatives in the Commons.[98]

The Expropriation Bill sparked mild criticism, by Woolliams during the second reading debate[99] and by Brewin in committee,[100] of powers given the Minister. In addition, Brewin doubted that the requirement to publish, in the Canada Gazette, a notice of intent to expropriate was adequate publicity.[101] He recognized that copies of the notice had to be sent to people affected by an expropriation, but he apparently overlooked the requirement to publish the notice in at least one issue of a publication in general circulation within the area.

Mr. Cantin (Parliamentary Secretary to the Minister of Justice) proposed that the Minister, rather than the hearing officer, have the responsibility for denying a hearing on the grounds that an objection to a proposed expropriation was frivolous, vexatious, or not made in good faith.[102] Brewin supported the amendment because such a decision, he maintained, would be more political than judicial:

> The Minister . . . could be reached by questions in the House of Commons or discussions on his estimates in the appropriate committee, so that a person who said, "Well they just ruled me out without any hearing," would have at least some recourse.[103]

However, Turner opposed the amendment, and it was lost.[104]

When the Bill reached the Senate, Lazarus Phillips exclaimed that

> I do not think that there is any reference to regulations by order in council in this bill. This is a most extraordinary and salutary innovation, and one which should be noted in Hansard so that in future, when we are dealing with powers asked for by ministers by way of appropriation of the right to give effect to the statutes by regulations, we will have a precedent to prove that one can draft a bill without the necessity of ancillary and complementary quasi legislation through the practice of orders in council and regulations.[105]

Although the Senator's enthusiasm was not entirely justified, inasmuch as there are other bills which contain no general power to make regulations, Phillips' attitude toward delegation is clear.

It will be recalled that during debate of the Water Bill, Aiken proposed, and Greene opposed, an amendment which would require interdepartmental consultation to coordinate pollution control measures.[106] During committee discussion of the Fisheries Bill, Messrs. Cyr (Lib.), Crouse (Cons.), and McGrath (Cons.), lamented the fragmentation of control among several departments. The Minister of Fisheries and Forestry should have sole responsibility, they believed.[107] However, the Minister (Mr. Davis) repeated Greene's assurance that there would be close liaison but "certainly without the full force of law."[108] Crouse then proposed that the cabinet be authorized to declare, upon this Minister's recommendation, anything to be a pollutant. The purpose of his amendment, he said, was to leave no doubt that Davis and his Department would have the full authority (with cabinet approval) "over policing the pollution of our waters, whether they be along the coast or inland."[109] Frank Howard opposed the amendment on principle:

> I am much more partial to declaring in the legislation what is meant, what is advocated, and what is prohibited in terms of what is a pollutant or what is an injurious or deleterious matter, to spell it out as clearly as we possibly can in the legislation rather than leaving the definitions to determination by the Minister or the Governor in Council. This is just a general approach I have, but I think Parliament should be making the declaration as much as it possibly can about these things rather than leaving it to the matter of regulations.[110]

The amendment was lost,[111] but one by Mr. St. Pierre (Lib.) which increased the cabinet's authority to define a deleterious substance, was approved.[112]

Barnett sought to repeal the authority given to the Minister, by Section 7 of the parent Fisheries Act, to grant fishing licenses "in his absolute discretion." Such a power, he suggested, "is really out of line with our understanding of our modern concept of the rule of law." The system of licensing should be in accordance with "regulations in written form so that all concerned, including members of Parliament, will know exactly what is being proposed or what is not being proposed."[113] McGrath, however, believed the existing provision was essential "for the Minister to be able to effectively enforce the will of Parliament. . . . The Minister, of course, is answerable to Parliament."[114] Because the amendment was beyond the scope of the Bill, it was ruled out of order.[115]

The following exchanges in committee were the only remarks made during the session about specific terms which identify the generality of delegated power, except for some comments about authority to make regulations for carrying out the provisions of an Act.[116] The discussion also illustrates the lack of understanding of at least one member of Parliament, but which is probably typical for a great many other members, of the subtle differences between terms. St. Pierre had just moved an amendment to Section 3 of the Bill authorizing the Governor-in-Council to make regulations "prescribing" certain things, whereupon Frank Howard said:

> Mr. Chairman, is the word "prescribing" the correct word, inasmuch as we have just changed one "prescribing" in the Bill to "respecting" [s. 4 of the Bill] to make uniformity throughout section 34, which says: "The Governor in Council may make regulations" and then there are quite a number of them. In all cases, it is respecting certain matters with the exception of (g) which used to contain the word "prescribe" but which the Committee earlier today changed to "respecting."[117]

J. G. Carton (legal adviser to the Minister of Fisheries and Forestry, Department of Justice) might have explained the difference between these two terms, but instead he merely replied that, "having regard to the phraseology in (1), (2) and (3) of this amendment, the word 'prescribing' is a more appropriate word than 'respecting.'" This was "O. K." with Howard.

At the report stage and during third reading debate, Crouse and Comeau stressed the need for advance consultation with fishermen because, in Crouse's words, the Liberal Party believes it is "ordained by the Almighty to rule."[118]

When the Bill reached the upper House, Senators were told that the Royal Assent was to be given in fifteen minutes.[119] Senator Martin suggested, over the protestations of Senator Orville Phillips (Cons.), that the committee stage be eliminated. Phillips then requested assurance that certain regulations "will be referred to a Senate committee when the Senate reconvenes." In reply, Martin stated that the Minister intended to consult with fishermen before the regulations were implemented. He added, that because the report of the Commons Special Committee on Statutory Instruments would be sent to the Senate Committee on Legal and Constitutional Affairs,

> that lends itself to an examination by the standing Senate Committee on Legal and Constitutional Affairs of all regulations passed by the Government. That is to make sure that they have a statutory base, to make sure that regulations that have legislative effect are being examined, to make sure that the authority pursuant to them is understood, and that the authority exists for the making of those regulations.[120]

The remaining six bills which produced relevant comments in both houses were generally less controversial, insofar as they related to subordinate legislation, than the seven already discussed.

Baldwin thought the regulation-making power delegated by the Excise Tax Bill was "a rather wide power to give to any government, much less this rather extraordinary government. I hope that the minister will have looked at this question by the time we come to that clause" in Committee of the Whole.[121] It was Marcel Lambert who raised the matter in committee, and he wanted to know specifically why the Bill authorized the Governor-in-Council to make exemptions from the air transportation tax.[122] He did not pursue the matter.

Senator Flynn raised the same point, and suggested that the cabinet was being authorized to alter "considerably the field of application of a tax."[123] When the explanation was given in committee, the Senator's only comment was: "That goes a little far, doesn't it?"[124]

During debate of the Corporations Bill, the discretionary power given to the Minister of Consumer and Corporate Affairs to decide whether companies would be incorporated by letters patent rather than by individual statutes, was questioned by Marcel Lambert and Baldwin. Both men feared that the power might be used "improperly" or "for political purposes."[125] Concern was expressed in committee, mainly by the representatives of interest groups but also by Lambert, about discretionary powers given to the Minister to investigate companies.[126] This concern was repeated in the Senate Committee on Banking, Trade and Commerce, but Senators made little comment.

The replacement of fixed license fees, under the Excise Bill, with authority to determine fees by regulation was noted by opposition members in both houses. Senator John M. Macdonald (Cons.) commented that "this brings to mind the debate which took place on regulations, referred to as Statutory Instruments," but he did not say why. He added that regulations need to be well defined and well known, now that they are increasingly required.[127]

When the Shipping Conference Exemption Bill was in committee, Skoberg asked A. P. Campbell of the Canadian Transport Commission how many orders-in-council would be required to implement the Bill. He was surprised with the answer--only the one to proclaim the Act.

> You mean that there are no regulations that have to be involved in this particular Bill, because I have found that the Bills means [sic] very, very little in so far as governments and people are concerned until the regulations are put into effect. As far as you are concerned, there are no regulations. They are all contained within this Bill at this particular time.[128]

Senators Hayden (Lib.), Hollett and Flynn commented upon the novelty of Section 14(1) which provided for the expiration of the Act after three years or on a later date fixed by proclamation. Senator Petten's (Lib.) explanation that "flexibility in the period of time [is needed] for testing the efficiency of this legislation" was evidently satisfactory.[129]

The Northern Inland Waters Bill caused no relevant comment in the House of Commons apart from Barnett's remark that the Bill contained a section, "as there is in most bills," delegating regulation-making power to the Governor-in-Council.[130] Senator Grosart, however, argued strongly that regulations must accompany bills:[131]

> I have said before, and I repeat, that this bill is an excellent example of the absurdity of Parliament passing a bill without having the regulations to be made under it, because more often than not the regulations are the core of the legislation. It is the regulations that tell us how the Government is going to interpret and administer the act.

He hoped that some day the Senate would refuse to pass a bill until the regulations were produced. He would tell the Government that "if you do not know what the regulations are, and if you do not know what you intend to do with an act before you ask Parliament to pass it, then you should not have the impertinence of coming before Parliament and saying that you want the act passed."

Although this Bill contained a privative clause (s. 21[4]), the only objection to it was raised in the Commons committee by a member of the Yukon Territorial Council.[132]

Crouse believed that the Government was seeking too much power under the Territorial Sea and Fishing Zones Bill. Although delegation is often justified, he said, "it should not result in a complete abdication of power by Parliament." Nevertheless, he later suggested that "everything we have heretofore left to the Governor in Council with respect to our territorial waters and our fishing zones has been marked by timidity, caution and inaction."[133] In committee, Brewin acknowledged that the cabinet would have to make regulations to implement his suggested amendment to extend pollution control to one hundred miles. He added:

> I would not like to say that I have more confidence in the Governor in Council and the executive than you [Mr. Laniel (Lib.)] apparently have but I have left it [the making of regulations] to them because the very nature of this Bill is one that is declaratory though it may be that more elaborate legislation should be spelled out later.[134]

Senator Crosart maintained that "the Government is asking us, if my judgement is correct, to give to the cabinet Order in Council powers greater than it has ever asked for or, indeed, ever been given since Confederation"--namely, the extension of Canada's jurisdiction into the high seas. However, the thrust of his argument seemed to be that Canada was taking "the law into their own hands" rather than that Parliament was being asked to delegate power to the cabinet.[135]

2. Bills Which Did Not Become Law

Ten bills containing enabling clauses came up for second reading debate but did not become law. Six were sponsored by the Government;

four by private members. All were introduced first in the House of Commons except the Government's Dominion Coal Board Dissolution Bill, which received third reading in the Senate but was not proceeded with in the House.[136]

Three of the four private members' bills were talked out on second reading, and the fourth went to committee but was not considered. The debate of none of the four bills contained comments related to subordinate legislation.

Of the six Government bills, only the Dominion Coal Board Dissolution Bill provoked no relevant debate. The other five were referred to committees; three of them were discussed in committee and one was reported back to the House. Relevant comments were made at all stages of debate.

Conservatives Nesbitt, Ritchie, and Marcel Lambert criticized the National Parks Bill for containing vague and excessive delegation to the cabinet and the National Parks Leaseholds Corporation.[137] Woolliams complained that existing regulations were "so lengthy and so confusing that there is not a lawyer in Canada who understands them."[138] The Bill was not considered by the Committee on Indian Affairs and Northern Development to which it was referred.

When the Investment Companies Bill was debated, Marcel Lambert and Baldwin disapproved of what they believed was excessive delegation to the minister.[139] Baldwin was especially concerned about the power to make exemptions from the Bill's application:

> That is not the kind of power which should be placed in the hands of an elected politician, no matter who he may be.

> Hon. members of this House who have sat idly by during discussion of legislation after legislation and have permitted these powers to be given to the government some day will have to answer to the people of Canada.

He also criticized the power delegated to the Governor-in-Council to make regulations "to ensure the proper carrying out of the provisions of this act" (s. 32).

> Who is to judge what is the proper carrying out of the provisions of the act? I think the committee which dealt with the matter of statutory instruments suggested a form of wording, and these certainly are not its words. The minister should give consideration to changing this clause to read, "The Governor in Council may make regulations to ensure the carrying out of the provisions of the act."[140]

The Committee on Justice and Legal Affairs did not consider this Bill which was referred to it.

When Justice Minister Turner moved second reading of the Federal Court Bill, he stated two advantages of placing, in a single nation-wide court, jurisdiction over federal boards, commissions, and tribunals.[141] First, it would remove these institutions from the "diverse jurisdictions and practices of the various superior provincial courts." The second advantage lay in the provision that the new Court would be able to review decisions of these bodies, "stripped of the archaic legalisms that have traditionally applied to the old remedies" such as prohibition, _certiorari_ and _mandamus_. He stressed that the Bill would not permit the courts to "supplant their policy for the policy that Parliament determined should be decided by those boards."[142] Nevertheless, boards should have to adhere to the principles of natural justice.[143]

The Minister also anticipated that Commons discussion of the report of the Statutory Instruments Committee would lead to the establishment of a scrutiny committee whose functioning would be "another step toward balancing the rights between the citizen and the state."[144] McCleave echoed this sentiment.[145]

In the Committee on Justice and Legal Affairs, Turner noted that one of the Bill's purposes was to eliminate privative clauses.[146] The Committee also approved an amendment proposed by the Minister's Parliamentary Secretary (Cantin) to require that changes in the rules of the Court made by the Court's judges have cabinet approval and be published in the Canada Gazette. In addition, interested persons would be invited to make representations concerning these changes.[147] The Bill was not reported back to the House.

Second reading debate of the Farm Products Marketing Agencies Bill focused on the broad powers given to the cabinet to establish marketing agencies. These agencies themselves would have broad powers in relation to agricultural products not covered by the Wheat Board Act. All three opposition parties expressed concern, but the Conservative critics were the most severe. Mr. Korchinski called the Bill "as damnable a piece of legislation as any I have seen introduced in what is supposed to be a free enterprise country in the free world."[148] The Honourable Douglas Harkness believed it would create "a completely state-controlled agricultural industry in this country,"[149] and the Honourable Walter Dinsdale was concerned about the Government having "more and more arbitrary control in delegating power to a growing public administration."[150] Skoberg criticized the absence of accompanying regulations,[151] and Mr. Fortin (R. Cred.) thought the Government was "overstepping its role in the field of agriculture" by attempting to do more than merely "help out by co-ordinating the various efforts" of producer groups.[152]

But it was Baldwin who placed the criticism within the perspective of parliamentary control of subordinate legislation:

> Over and over again I have pointed to clauses in various bills which have been introduced by the government. In those clauses and bills the government has sought, and the House and Parliament has given to it, the right to rule by Order in Council, by decree and by regulation without there being the necessity of the government ever having to come back to Parliament.
>
> . . . .
>
> As I say, if the proposals contained in the report of the special committee on the subject of regulations were in effect, I would feel a little safer. But seven months have gone by and the report is still gathering dust. . . . I am confident we shall reach the end of the session without action being taken and that the excellent recommendations agreed upon by members of all parties will go down the drain.[153]

To a suggestion made in committee by Mr. Roy Atkinson (president of the National Farmers Union), that the Bill "be amended in such a way as to make it [the National Farm Products Marketing Council] fully accountable to parliamentary scrutiny and inquiry," Mr. A. B. Douglas (Lib.) replied that the requirement for annual reporting to Parliament through the minister should suffice.[154] The Committee had not finished its consideration of the Bill when Parliament prorogued.

Government reliance on orders-in-council was criticized by Messrs. Gleave (N. D. P.) and Baldwin during the debate on second reading of the Grain Bill. "We recognize the minister's plea for flexibility," said Gleave, "but I think he has carried it too far in this act."[155] Baldwin added that

> this government has become a genius in giving to itself large chunks of power by the writing of regulations and the passage of orders in council . . . . I think some day the country will wake up to the fact that it has made a very serious error in giving away to a group of people, such as any cabinet or government, the right to do some of the things we have given them the right to do.[156]

In the Committee on Agriculture, the Minister (Mr. Olson) acknowledged that one of the more significant changes incorporated in the Bill was the delegation of more power to the Governor-in-Council, especially authority to alter the grades set out in the Schedule. This flexibility was needed, he argued, to meet changing market conditions. However, he believed that the eight-month delay required before grade changes could be effective, and their mandatory tabling within fifteen days of their making, provided adequate opportunity for discussion in Parliament.[157]

The requirement to table, Olson said, "is important because it brings to the attention of Parliament these changes and will permit Parliament to consider them under the rules of the House." And what are those "rules"? Mr. George Muir (Cons.) was apparently unfamiliar with Standing Order 41, and the Minister was not about to explain it, as the following exchange indicates:

> Mr. Muir (Lisgar): Do you think actually that is Parliamentary consideration when you have a *fait accompli*, give it to Parliament, they kick it around for a couple of days and there is nothing they can do?
>
> Mr. Olson: Mr. Chairman, I do not agree at all that there is nothing they can do. I have to draw to your attention that this will be before Parliament--it will not necessarily be before Parliament in a formal way by way of a motion or something tantamount to a motion, but it will be drawn to the attention of Parliament a long while before it becomes operative. . . . If it is drawn to their attention then of course Parliament can make its own decision on when it will be discussed but there

will certainly be plenty of time for it to have that discussion.

Mr. Muir (Lisgar): Do you visualize its being brought to Parliament on a statement on motions?

Mr. Olson: No, I am not sure that it would be brought in by a statement on motions, but what I am sure of is that it will be drawn to the attention of Parliament in such a way that they are apprised of the changes contemplated, and furthermore, there will be quite a long period of time when Parliament would have the opportunity of giving consideration to it before it is operative.

. . . .

The Chairman [Mr. Beer]: May I interrupt to clarify one question? Is it mandatory that it come before Parliament and that Parliament give approval before it becomes effective?

Mr. Olson: It is mandatory that it be brought before the attention of Parliament, but the Canada Grain Commission nor anyone else in my view has not the right to arrange the Parliamentary timetable.

. . . .

Mr. Muir (Lisgar): The point I was trying to make of course is that although it will be brought before Parliament actually the consideration Parliament can give it will not make any changes in it . . . . Suppose it has to do, for instance, with the powers provided to the Cabinet . . . [A]ll you are suggesting is that you are going to bring it to Parliament's attention. There would probably be a statement made on it by the government and the leader of the opposition and representatives of the other parties and that is it. Is that not correct?

Mr. Olson: Mr. Chairman, that is not necessarily it. That may happen, but Parliament may also make a determination that they want to do something more than simply comment on the order. In my humble opinion, Parliament is supreme, and if they take any other action by way of a motion passed by Parliament that could in my view alter the order.[158]

As a result of opposition pressure, the Minister and Committee accepted an amendment to Section 114 to ensure a six months delay between the issuance and the effectiveness of a proclamation bringing eastern Canadian grain elevator companies under this legislation. Danforth had proposed an amendment requiring the affirmative resolution, by both houses, of such a proclamation. He withdrew it, however, when Olson promised the six months delay and suggested that this would give Parliament adequate time to study the regulations which would accompany a proclamation, to refer them to the Committee on Agriculture, and to generate an annulment resolution if Parliament chose.[159]

The report stage was interrupted by the prorogation of Parliament and so forty-four amendments, which members were going to propose, were not introduced. Nevertheless, Olson commented upon several of them. One of these, suggested by Baldwin, would limit the duration of some regulations to one year unless approved by the Committee on Agriculture. The Minister said that committee responsibilities should not be changed

> from those of lawmakers to those of administrators of that law. Those are the responsibilities of the government and its agencies, according to our constitution and the structure of our government. . . . I predict that if we were to acquiesce in the amendment it would not take the committee long to realize that this change had placed a burden on it that was not appropriate or in keeping with its responsibilities as a law maker, and that it is not necessarily an administrator of government policies.[160]

Olson is doubtlessly correct that the requirement of approval is generally inappropriate, especially the approval of a committee. Whether regulations should in some instances be referred to committees, either before or after they become effective, is another matter. Indeed, ministers have often agreed that regulations might appropriately be so referred,[161] and existing standing committees have been suggested as the proper vehicles for Parliamentary scrutiny of subordinate legislation.[162]

B. Other Opportunities to Comment upon Subordinate Legislation and its Control

In addition to the debate of legislation which contains enabling clauses, members of both houses have other opportunities to comment upon the delegation of authority and the adequacy of means to control the exercise of this authority. To what extent have these other opportunities been seized for this purpose?

1. Debate of Bills which Contained no Enabling Clauses

(a) Bills which became law

Twenty-two public bills which did not delegate authority became law during the 1969-70 session. Twelve were sponsored by the Government, three of which were first introduced in the Senate; and ten were private members' bills, one of which was first introduced in the Senate.[163] In neither house did any of the private members' bills provoke comment relevant to this study.

Of the Government bills, two sparked relevant comment in both houses, three others only in the House of Commons, and the remaining seven in neither house.

The only criticism of the Customs Tariff and Excise Tax Bill was expressed in the Commons Committee of the Whole during an exchange between the Honourable Herb Gray and Marcel Lambert. Lambert argued that, although the publication of orders-in-council in the Canada Gazette might satisfy the law, it did not mean that people outside the "Golden Triangle of Toronto, Montreal and Ottawa" have immediately become aware of them.[164] Mr. Gray, who had introduced the Bill for Finance Minister Benson, thought that the report of the Statutory Instruments Committee "may well point the way to changes in the manner in which publication is made of those orders."[165]

The clarification which the Bill made in the affirmative resolution requirement (noted in Chapter VII)[166] was outlined by the Bill's sponsors in both houses during second reading debate, and by Senator Hayden again in committee, but there was no other discussion.[167]

The purpose of the Aeronautics Act Regulations Bill was to ratify retroactively several regulations made in 1954 and 1960 under Section 4(1) of the Aeronautics Act. These had been made by the Governor-in-Council, rather than by the Minister of Transport with the approval of the Governor-in-Council. Baldwin, the only private member to comment upon the Bill (except for Liberals Allmand and Pringle[168] who asked a few questions for clarification in committee), took the opportunity during the debate on third reading to criticize the Government for failing to implement the then-nine-months-old recommendations of the Statutory Instruments Committee.[169] After lamenting that "we are continually giving the government, at its request and demand, power to act by Order in Council, regulation, decree and ordinance" so that "at the present time there is very little legislative power left in this House," he stated that the Bill was an excellent illustration of "the dangers and evils of giving unrestricted rights to any government." He continued with readings from the report of the Statutory Instruments Committee, comments upon his observation of the United Kingdom House of Commons scrutiny committee in action, and an appeal for the establishment of such a committee in Ottawa. He concluded with the following motion to amend the Bill:

> That all the words after "that" be deleted and the following substituted:
> "This House will not proceed upon a measure to validate retroactively Orders in Council of doubtful legality, without

> obtaining the safeguards and controls which will be brought about by the implementation of the third report of the Special Committee on Statutory Instruments tabled in this House on Wednesday, October 22, 1969.[170]

When the Bill reached the upper House, Senator Urquart, who moved second reading, noted that "the whole question of 'statutory instruments' is now before the Standing Senate Committee on Legal and Constitutional Affairs."[171] Senator Yuzyk (Cons.) suggested that the Bill "will undoubtedly serve as a catalyst to implement in the very near future much needed reforms regarding safeguards and controls in the field of statutory instruments."[172] Grosart pointed out that this Bill illuminates the fact that any study of the question of subordinate legislation "will fall short of reaching a satisfactory objective" unless it examines "the general lack of care and scrutiny that seems to be given to the granting of this authority."[173]

The three bills which produced relevant debate only in the House of Commons, were the Deep Sea Fisheries (Repeal) Bill, the Coastal Fisheries Bill, and the Labour (Standards) Code Bill. With respect to the first of these, there was discussion in committee to clarify a tabling requirement in the parent Act, but there was no controversy.[174]

In committee and again during the debate on third reading of the Coastal Fisheries Bill, Crouse proposed an amendment to require the Governor-in-Council to make regulations upon the recommendation of a provincial Lieutenant-Governor-in-Council. The discussion was unrelated to the question of regulation-making power or its control.[175]

Speaking to an amendment to the Labour (Standards) Code Bill, proposed in committee by Stanley Knowles (N. D. P.) to raise the minimum wage to $2.00 instead of $1.65, Labour Minister Mackasey assured the committee that a contemplated revision of the Code would include "some simple amendment . . . that would make it possible for the Governor in Council to increase the minimum wage without going through the . . . road of new legislation."[176] An amendment moved by Mr. Alexander (Cons.) to give this authority to the cabinet immediately, was defeated.[177] At no time was there discussion of the delegation aspect of the issue.

(b) Bills which did not become law

Twenty-two bills, all sponsored by private members, which went beyond first reading contained no enabling clauses. Three of these, talked out on second reading, prompted comments related to subordinate legislation.

Mather's Government Administration (Administrative Disclosure) Bill pertained to the larger question of government secrecy, and only indirectly to that of regulations. The key clause in the Bill, according to the sponsor, was that "every administrative or ministerial commission, power and authority shall make its records and information concerning its doings available to any person at his request in reasonable manner and time."[178]

Although Mather did not make the connection, this principle of "open government" was a vital premise adopted by the Statutory Instruments Committee.[179] Indeed, of the five participants in the debate, only Baldwin referred to that Committee. He also alluded to evidence presented by civil servants to the Committee concerning what he called "the measure of secrecy which prevails in respect of the origin and actual promulgation of many orders in council and ministerial decrees which affect to a large extent the lives and fortunes of very many citizens of this country." He said he was "amazed at the inherent and implied criticism of the processes of government which were laid open as a result of the deliberations and the report of that committee."[180]

Mr. Robert Thompson (Cons.) introduced two bills to establish a federal ombudsman. The Parliamentary Commissioner Bill came up for second reading in January, 1970; the Financial Administration Act Amendment (Parliamentary Commissioner) Bill, which would expand the duties of the auditor general to include those of ombudsman, was debated the following October.

During the debate on the first of these bills, Justice Minister Turner expressed doubts about the propriety of an ombudsman, although he recognized that the mere presence of such an official would be "a psychological barrier to arbitrariness." He went on to review what the Government was attempting in order to remedy the situation for which Thompson proposed the ombudsman: to establish a law reform commission, to undertake a "wide area" of administrative law reform as proposed in that session's Throne speech, to establish through the Federal Court Bill a broader system of judicial review "of all decisions of federal administrative boards and federal administrative tribunals," and to implement many of the recommendations of the Statutory Instruments Committee. He added, however:

> if we find that those wider parliamentary powers of the legislature as against the executive, and thereby the administrative--

> wider judicial powers of the citizen against administrative tribunals--fail to do that, I admit there is a case for an extralegal and extraparliamentary remedy along the lines of an ombudsman.[181]

Stanley Knowles agreed that all these reforms were needed, and that an ombudsman "would certainly not be a good substitute for the kind of thing he [Mr. Turner] is proposing. He thought, nevertheless, that "it would be a real comfort to our people if they were to know that apart from Parliament, apart from the government, the opposition, the bureaucracy and the courts, there was an ombudsman, an independent authority to whom reference could be made."[182]

In the course of Defence Minister Donald Macdonald's remarks concerning Thompson's second bill, the Minister referred to his earlier role as President of the Privy Council when he and the Minister of Justice had "the responsibility for considering and advising the government on not so much the narrow question of the ombudsman but, really, the process for the review of administrative action which included . . . the evolving procedure for examining statutory instruments." He noted that during the next session the Government would be introducing legislation and a motion for a change in the Standing Orders to establish a scrutiny committee.[183]

Both Mr. Macdonald and Mr. Gillespie (Parliamentary Secretary to the President of the Treasury Board), who were the only speakers except for Thompson, concluded that an ombudsman patterned on the institution in other countries may not be appropriate for Canada. Their arguments were essentially those made by Turner during the earlier debate.[184]

2. Other Opportunities within the House of Commons

(a) Throne speech debate and budget debate

The Standing Orders provide a number of opportunities for private members to raise and discuss matters which interest or concern them. Traditionally, the debate on the address in reply to the speech from the Throne, and the debate on the budget, afford much latitude for this purpose.

During the 1969-70 session's Throne speech debate, only Baldwin commented on the specific area of subordinate legislation. He suggested that "more than 90 per cent of the measures which affect the people in a democracy are those that are not seen in the form of legislation but rather in the form of orders-in-council and regulations," and he expressed optimism that the recommendations of the Statutory Instruments Committee "will have a very considerable impact on the working of this parliament."[185]

Mr. MacGuigan, who had chaired that Committee, spoke approvingly of the expansion of executive power during the present Parliament, including "the growing supremacy of the Prime Minister's office and the Privy Council office within the government structure," but he added that

> it is also important to strengthen the legislature, not only as a counterbalance to the executive because of the fear that power may corrupt but for a positive reason. There must be increased participation in government, participation of the public as well as of members of parliament.[186]

He noted changes which had been made, and several which he thought should be made, in the House of Commons committee system. Although he did not urge a regulation-scrutinizing function within that system, such a role was probably implicit in his remarks.

The budget debate contained nothing relevant to parliamentary control of subordinate legislation.

(b) Questions

(i) Oral questions

Of the numerous questions asked throughout the session during the daily forty-minute question period, some seventy-seven were directly related to regulations, but only twenty-five were relevant to the issue of control. Of the rest of the seventy-seven, twenty-four pertained to the subject matter of regulations, nine asked if or when the Government would be preparing regulations or amendments to them, eight expressed a need for regulations or amendments to them, seven asked when regulations would be ready or made effective, two voiced concern that regulations were not being enforced, and two asked about the extension of expiry dates of regulations.[187]

Most of the twenty-five questions which pertained to control were related to specific sets of regulations. Two of them asked if regulations would be referred to the appropriate House standing committees.[188] Four others related to Government consultation with interested parties.[189] Six asked if or when the Government would table regulations, or why tabling was taking so long. Two stressed the need for publicizing regulations.

Woolliams wondered if the Government planned to appeal, to the

Supreme Court of Canada, a magistrate's court ruling that Wheat Board quota regulations were unconstitutional.[190] And the Honourable Robert Stanfield asked Prime Minister Trudeau if

> it is the position of the government that it is appropriate for the government of Canada to delegate to an independent commission [the Prices and Incomes Commission] responsibility for decision-making in an area that has become of very central importance to the successful government of this country.[191]

The concern which several members felt about the second Arctic voyage of the Manhattan in April, 1970, was expressed in several questions about the regulations which the Government was preparing to control the voyage. In a unique move, Mr. Nesbitt (Cons.) asked that these regulations be appended to Hansard. Transport Minister Jamieson had "no objection," and the House agreed.[192]

Eight inquiries made during the session raised the broader issue of control over subordinate legislation--six were made by Baldwin and two by Brewin. At least seven of the eight were attempts to elicit a statement of the Government's intention concerning the recommendations made by the Statutory Instruments Committee.[193] Privy Council President Macdonald's reply to the first of these questions, that a statement would be made before the end of the session, proved to be accurate. That statement came on June 16.[194]

(ii) Questions on the Order Paper

A total of 2,096 questions were placed on the Order Paper during the session. Of these, thirteen were relevant to this study, although all but one were questions about specific regulations or statutes: were there regulations, what were the regulations, what were the changes in regulations, how many charges were laid for violations of an Act or regulations? Only one question was more general--Skoberg asked how many orders-in-council had been passed during certain years since 1950.[195]

(c) Standing Order 26

Forty-three times during the session, members asked the Speaker's permission under Standing Order 26 to seek leave of the House to move adjournment "for the purpose of discussing a specific and important matter requiring urgent consideration," but only once did that matter concern regulations. Mr. Mahoney (Lib.) wished to discuss the "divisive impact [upon Canada] of recent rulings and regulations and announcements of proposed regulations" of the Canadian Radio-Television Commission,

> and the indications by the chairman of that commission . . . that if Parliament does not like the way the commission is interpreting its mandate [under the Broadcasting Act] it is up to Parliament to change the mandate not up to the commission to change its interpretation.[196]

The Speaker noted that this matter was before the Committee on Broadcasting, Films and Assistance to the Arts, and ruled that the issue was not one of urgency.[197] Indeed, the requirement of urgency generally makes this procedure inappropriate for raising matters of concern about regulations and their control.

(d) Standing Order 43

There were sixty-seven occasions when members asked the unanimous consent of the House, under Standing Order 43, to raise matters "of urgent and pressing necessity" without the forty-eight hour notice required by Standing Order 42. Two of these occasions related to the present study, but on neither one was consent given.

On February 5, 1970, Baldwin wanted the House to

> refer to the Standing Committee of the House on Procedure and Organization the question of providing for members ways and means of meeting the serious situation brought as the result of the extent to which the government in general and the Prime Minister in particular have obtained abnormal increases in power and authority while downgrading the role and decreasing the effectiveness of the House and to recommend ways and means of coping with this alarming situation including such changes in the Standing Orders as may be required.[198]

Four months later, Baldwin had become even more disturbed that the Government had apparently done nothing, nor made any statement of intention, to implement the recommendations of the Statutory Instruments Committee. He was increasingly concerned that the growth of executive authority by means of enabling legislation, "without any legislative means to challenge the same," was leading to a "falling apart of responsible government." He therefore wanted to move:

> That this House ought to refuse to enact any further legislation which delegates power to the government or its agencies until the safeguards provided in the report of the Special Committee on Statutory Instruments have been implemented.[199]

Although unanimous consent was denied, this motion together with other inquiries (including two made on the same day)[200] may have hastened the Government's formal response two weeks later (June 16) to the Statutory Instruments Committee report.

(e) Notices of motion for the production of papers

Of the 519 motions for papers during the session, thirty had some relevance to the present study.[201] Sixteen of these were requests for orders-in-council or regulations, and all were adopted except one which was withdrawn because the document had been tabled, and one which on the last day of the session was allowed to stand at the request of the Government.

Four other motions asked for departmental or cabinet directives. Two were adopted and two were transferred for debate. The first motion transferred (No. 204, Mr. Broadbent, N. D. P.) called for a cabinet directive, to which reference had been made in a press release by the Minister of Manpower and Immigration, on summer employment for students. The Prime Minister's parliamentary secretary (Mr. Walker) maintained that "a cabinet directive is a cabinet document" and, as such, is "not . . . included among those documents covered by motions for the production of papers."[202] The debate of the motion is considered below.[203] The second motion transferred for debate (No. 161, Mr. Lewis, N. D. P.) requested the "directive or directives of the Department of Manpower and Immigration regarding draftdodgers and military deserters". In reply, Mr. Gendron (Parliamentary Secretary to the Minister of Manpower and Immigration) stated that "the papers . . . are guidelines for the internal use of the department. They have been sent by the central administration to the staff of the local offices. As they are confidential, it is not customary to make them public."[204] The motion did not come up for debate.

Nine of the thirty motions called for correspondence related to orders-in-council, regulations, or departmental guidelines. Three were withdrawn, four were adopted, and two were transferred but did not come up for debate.

Although other motions requested the tabling of correspondence not related to statutory instruments, Broadbent's Motion No. 203, which called for a copy of a letter from the Prime Minister to the Chairman of the Science Council of Canada, must be mentioned because it later became the subject of a vigorous debate discussed below. In his response to the motion, Walker stated that the requested letter "is related to the internal functions of the government and not in the public interest to be released." He also referred to "the long established principle of the House that such documents are privileged."[205]

(f) Private members' business

Standing Order 15 provides for one hour each Monday and Tuesday to a maximum of forty hours, and one hour each Thursday and Friday, for the conduct of private members' business such as private bills, private members' public bills, resolutions, and motions for papers which have been transferred for debate. This time was used on sixty-five sitting days during the 1969-70 session.[206] The debate of public bills has already been considered. Of the fifty-one resolutions, twenty-four were considered by the House. Four of those which were considered, and three not considered, were relevant to this study.[207] Of the nineteen motions for papers, two were pertinent.

On November 17, 1969, Pringle moved that the House urge the Governor-in-Council to make certain regulations under the Customs Act, but the debate related solely to the subject matter of the proposed regulations.[208] On January 19, 1970, Mr. Orlikow (N. D. P.) moved that a special Commons committee be appointed to examine and make recommendations concerning "the role of the Senate within Parliament and in its general constitutional functions." Although neither the resolution nor the debate touched the matter of subordinate legislation, the opportunity existed for discussing the Senate as a possible scrutinizing body.[209]

Because Mr. R. Stewart (Lib.) was concerned that the government was being run by civil servants "who are encrusted in regulations," he moved on March 23, 1970:

> That in the opinion of this House, the government should consider the advisability of introducing legislation to provide for the appointment of some elected Members of Parliament to the boards of directors of the various Crown corporations and other federal agencies so as to assure a better and more direct control of the legislative power over the executive power, to restore to Parliament part of its authority and to better utilize the various talents of the parliamentarians.[210]

The debate on this motion, which related almost exclusively to Crown corporations, contained virtually nothing about the control and the restoration of which the motion spoke. Perhaps the comment which was the most germane to the present study was Mr. Fairweather's statement that "I do not think we are legislators any more. . . . I think the way for control by Parliament over the cabinet would be by a greatly beefed-up committees system with very much more independent advice for committees."[211]

In the fourth motion, debated April 27, Mr. Mazankowski (Cons.) asked that the Governor-in-Council amend regulations under the Income Tax Act. However, nothing in the debate was pertinent to the present study.[212]

The two relevant motions for papers, both sponsored by Broadbent and both transferred for debate on November 19, 1969, touched off debates about government secrecy. Both were negatived. The first motion (No. 203), debated on May 21, 1970, called for a copy of a letter from

Prime Minister Trudeau to the chairman of the Science Council of Canada. In defence of the Government's position that this was privileged information, Mr. Forest (Parliamentary Secretary to the President of the Privy Council) offered statements from Wade and Phillips' Constitutional Law, John Stuart Mill, Gladstone, Lord Morrison of Lambeth, Professor Wiseman, Sir Ivor Jennings, the report of the Canadian Task Force on Government Information, and the report of a United Kingdom committee which examined that country's civil service.[213] Baldwin[214] called that speech "so much garbage" and maintained that the authors quoted "had never contemplated a government such as that headed by the right hon. gentleman at the present time, a government that is greedy, avaricious, grasping for power, secretive, incapable of producing the free and open society that we must have." He concluded that the report of the Statutory Instruments Committee, which the government had received "with hosannas" and which would if implemented "create the open government system in Canada and would make sure that the government would be regulated and controlled and that Parliament would be supreme," has likely been buried and "we will probably never see it again." He therefore congratulated the Senate for initiating its own study of subordinate legislation.

Broadbent asserted that the only justifiable reasons for secrecy are state security, the possibility that disclosure could facilitate the making of improper financial gain, and the libellous nature of certain documents. The Government had failed, he said, to justify the secrecy it maintained.[215]

The second motion (No. 204) debated one week later, called for the production of a cabinet directive on summer employment. The arguments, less sophisticated than those presented the previous week, added nothing new.[216]

(g) Allotted days

Standing Order 58 requires that twenty-five days be set aside each session for the business of supply defined as

> motions to concur in interim supply, main estimates and supplementary or final estimates; motions to restore or reinstate any item in the estimates; motions to introduce or pass at all stages any bill or bills based thereon; and opposition motions that under this order may be considered on allotted days. [S. O. 58(2).]

Because opposition motions "shall have precedence over all government supply motions on allotted days" (S. O. 58[8]), these days are generally known as Opposition Days. These motions "may relate to any matter within the jurisdiction of the Parliament of Canada" (S. O. 58[3]), and so are presumably used to discuss matters which to their sponsors are of greatest or of most immediate concern.

The Progressive Conservative Party was allocated fourteen of the twenty-five days, the New Democratic Party was assigned six days, and the Ralliement Creditiste was given four.[217] (One day was devoted to consideration of supplementary estimates "B"; relevant comments were noted above.)[218] To what extent was the question of parliamentary control of subordinate legislation considered important enough to be raised on these occasions? Two of the opposition motions were at least potentially relevant to the present study.

On March 5, 1970, the Honourable Robert Stanfield, Leader of the Opposition, moved the following non-confidence motion:

> That this House condemns the government for its arbitrary actions and destructive policies of secrecy and non-disclosure including its attitude towards parliament which deny the right of citizens in this country to be informed and to participate fully in the government of Canada, particularly through their elected representatives, and which endanger the balance between the two structures of government--the executive and the representative.[219]

The growth of executive power under Prime Minister Trudeau was alarming, he asserted, and was downgrading Parliament. Because this growth was partly the result of the delegation of "very extensive powers" to the cabinet, Stanfield lamented the lack of Government action to implement the recommendations of the Statutory Instruments Committee.[220] During the rambling debate on this motion,[221] members presented their views of the proper relationship between the executive and legislature, and of the adequacy of opportunities for private members to raise matters which concern them. However, Stanfield's was the only expression of concern about delegated powers and control of their use.

The only other allotted day which might have sparked comments relevant to the present study was April 21 when Stanfield, with another non-confidence motion, led an opposition offensive against what they understood to be a Government attack on the auditor general. He moved:

> That this House condemns the government for criticizing the Auditor General of Canada for carrying out his duties according to law; and reasserts its support of the principle of unfettered parliamentary scrutiny of government expenditures including the right of the Auditor General to comment on the failure of the government to make expenditure in strict compliance with parliamentary appropriations and to report on these and any other cases he feels should be brought to the attention of Parliament.[222]

Both he and T. C. Douglas established foundations for a call to greater parliamentary control of subordinate legislation, but neither leader broadened his remarks in that direction.[223]

(h) The estimates

In addition to the main estimates for 1970-71, Parliament voted interim estimates for that year and supplementary estimates for 1969-70. There was no discussion of the interim estimates.

(i) Main estimates for 1970-71

Apart from half a dozen noncontroversial questions which were asked about regulations in specific areas when these estimates were before standing committees, there were only five references to subordinate legislation as it relates to the present study. One of these was merely the expression of approval by Mr. Moore (Cons.) that an amendment to the Animal Contagious Diseases Act the previous year had expanded the power delegated to the Governor-in-Council to permit adjustment, without parliamentary action, of compensation rates in relation to condemned animals.[224]

A second was the statement of concern by Marcel Lambert regarding the application of immigration regulations which "are of your own devising; they never have been submitted to Parliament for consideration in detail."[225] Orlikow pursued the point and criticized the discretion possessed by immigration officers at the border. The chairman of the Immigration Appeal Board (Miss Janet Scott) replied that this discretion is authorized by regulations "written right into law . . . passed by Order in Council." Mr. Orlikow retorted: "Well, that does not make it right. They are not quite gods up there in the Privy Council office."[226]

In a third reference, Mr. Carter (Cons.) said he was perturbed that new regulations controlling the seal fishery "are contrary to the unanimous recommendations contained in the [Fisheries and Forestry] Committee's Sixth Report of the last session." He moved that "the Committee recommends to the Minister that the new regulations announced by him be rescinded forthwith."[227] Although there were several occasions during the session when suggestions were made, and accepted by ministers, that regulations be referred to committees for discussion, this appears to be the only motion urging that regulations be revoked.

Fourth, Barnett asked witnesses who appeared before the Committee on Fisheries and Forestry whether they would be satisfied if the Minister could alter salmon fishing licensing regulations at his own discretion, whether "the salmon licensing arrangement should be formalized at least in the form of regulations that require Order in Council," or whether "it might be something that should be changed only by the approval of Parliament."[228] Officials of both the Fishing Vessel Owners' Association (Mr. Frank Buble, secretary treasurer) and the United Fishermen and Allied Workers' Union (Mr. Homer Stevens, president) opposed ministerial discretion alone, and Stevens added that the salmon license control program is instituted

> bit by bit through press releases and "questions and answers" bulletins, without any supporting legislation. . . . As pointed out to the Committee last year, without even an Order in Council, far-reaching rules affecting the rights of all commercial fishermen, are dictated by the Minister and made effective by the Department. Parliament does not get any opportunity to deal with the issues. No legislation on the subject has been presented to this Standing Committee and recommendations of this Committee as contained in the record of Votes and Proceedings on May 30, 1969, have been ignored. . . . We want it [the program] to be introduced by legislation which can be properly discussed in this Committee and in Parliament.[229]

To this suggestion, Mr. Goode (Lib.) said "Good."[230]

The fifth reference to subordinate legislation was made during consideration of the Justice Department's estimates. MacGuigan asked Turner if he was "prepared to make some comment on the subject of statutory instruments which is one of concern both to Parliament and the people." He said that he and other former members of the Statutory Instruments Committee were "becoming rather anxious to see the fruits of the government's consideration."[231] Brewin added that he, too, was "extremely interested in that report and its being fully implemented. We are not impatient but we are anxious."[232]

The Minister replied that both he and Privy Council President Macdonald "personally supported the general tenor of those recommendations," and that they hoped to submit a proposal to cabinet soon. He envisaged the implementation of the recommendations as but one part of a Government program to protect individual rights. A scrutiny committee to review subordinate legislation would also be a partial review of the administrative process, a federal court Act would provide judicial review of administrative commissions "acting judicially or quasi-judicially," an administrative procedures statute would explore "the internal proceedings of administrative tribunals," and a federal human rights commission would "improve the relationship between the average citizen and his government."[233]

(ii) Supplementary estimates for 1969-70

The only reference to subordinate legislation during committee discussion of the supplementary estimates was made in relation to Vote

36b of the Department of Trade and Commerce. An amendment was approved to permit the Governor-in-Council to make regulations in accordance with which payments under that Vote would be made. Marcel Lambert sought assurance that these regulations would be published in the Canada Gazette, "or that the Minister would even extend the greater courtesy in tabling them in the House." He hoped they would not be made exempt under Section 9 of the Regulations Act:

> I am very concerned about the non-publication and this sort of casual publication of regulations that are made. We have seen that there has been a little dragging of feet with regard to the report of the Statutory Instruments Committee and that these regulations which are frankly as important as and sometimes much more important than the statute are things that are prepared beyond the reach of Parliament. They are blanket authority and Parliament itself has no chance to get at these regulations.[234]

(i) The ten o'clock adjournment

On Mondays, Tuesdays, and Thursdays there may be a debate of up to thirty minutes on the adjournment motion, to discuss matters previously communicated to the Speaker and announced to the House (S. O. 40). The member raising an issue may speak for seven minutes, and a minister or his parliamentary secretary may reply for three minutes.

Of the approximately ninety-one sitting days when this opportunity was available, sixty-four were used. On seven occasions only one item was raised; on sixteen days two items were discussed; and on the remaining forty-one days the maximum of three were considered. Of the total of 162 matters raised during the session, eight had some relevance to the question of subordinate legislation but none was germane to that issue.[235]

(j) Other committee studies

During the 1969-70 session, standing and special committees undertook thirty-one special studies referred to them by the House of Commons. In addition, the Public Accounts Committee performed its annual review of the auditor general's report to the House. Of the thirty-one, nine contained discussion relevant to the present study[236] but in only three did committee members express concern about the relationship between Parliament and delegated authority.[237]

One of these three was the Justice and Legal Affairs Committee's discussion of electronic eavesdropping.[238] The Committee acknowledged the need for legislation in this area, but members were anxious that the application of such statute be closely controlled by Parliament. A Committee recommendation, that legislation and regulations define procedures to be used by police forces in seeking permission to employ electronic eavesdropping, was altered in the face of objections to the term "regulation." Murphy maintained that "if wire tapping is going to be conducted then I think this should come through Parliament," not a cabinet minister.[239] MacGuigan acknowledged that regulations would in fact be required, but he agreed that inclusion of the term in the recommendation "unduly emphasizes the use of regulations."[240] The Committee also urged that legislation clearly specify the conditions upon which authority would be granted to intercept communications,[241] and that the Attorney General for Canada be required to give Parliament an annual accounting of all use made of this power.[242]

> Parliament must be informed in order to assess the propriety of the use of the power which it grants, the effective-

> ness of the safeguards and to maintain vigilance in preventing the erosion of civil liberties. Considering the nature of the power granted in this instance, Parliament must ensure that it is fully informed.[243]

This statement had broader application to subordinate legislation generally; unfortunately, few members of Parliament seemed to recognize this.

The second study during which concern was expressed was the Finance, Trade and Economic Affairs Committee's consideration of the Government's Proposals for Tax Reform. McCleave wanted to know how much time would elapse between the passage of new legislation and the effective date of the accompanying regulations, and whether these regulations--"all of them," "without exception"--would be published in the Canada Gazette.[244] The Honourable J. P. Coté, Minister of National Revenue, replied that the delay should be no more than one or two weeks, because the Bill and regulations would be drafted concurrently. All regulations would be published.[245] Burton thought that the draft regulations should be made public when the new tax bill was before Parliament so that debate could be more relevant.[246] Chairman Clermont commented, not entirely correctly, that this would be "a first."[247]

During the same study, Marcel Lambert was apprehensive of the proposed scope of ministerial discretion, particularly to designate "widely-held" corporations.[248] The Committee recommended "that some mechanism be devised by which companies could be advised of the Minister's intention to use his power [to make this designation] and be given an opportunity for hearing and appeal."[249]

Concern about the relationship between Parliament and regulations was expressed also during the study, by the Committee on Broadcasting, Films and Assistance to the Arts, of the Canadian Radio-Television Commission's 1968-69 report. In the face of criticism, by Committee members and the broadcasting industry, Commission chairman Pierre Juneau appealed to the guidelines stated in the Broadcasting Act, as he had done three months earlier when the Commission's decision respecting cablevision was before the Committee.[250] However, it was upon the Commission's interpretation of these guidelines, especially the proposed regulations specifying levels of Canadian content in broadcasting, that criticism was focused.[251] Mr. Stafford (Lib.) expressed this criticism most succinctly when he asked, "do you not think . . . you are overreading the requirements of the Broadcasting Act;" but the criticism of Jean-R. Roy (Lib.) was the most severe.[252] Mr. Juneau insisted that "somebody has to do it [interpret the Act] and we have been asked to do it." "What we are trying to do is strictly for the purpose of implementing the Broadcasting Act" although, he acknowledged, "certainly on the particular details of some of our decisions, we have to make up our mind just like any management organization has to start from broad policies and take the responsibility for the details."[253] In reply to Mr. Schumacher (Cons.), Juneau said that the cabinet has played no role whatever "in the formulation of these regulations, whether in an unofficial or official capacity, through ministers or their employees."[254]

The 1967-68 Public Accounts were tabled in the House of Commons on January 14, 1969, and the Auditor General's report on March 26, 1969. Both were referred to the Standing Committee on Public Accounts on

November 21, 1969.[255] Paragraph 113 of Mr. Henderson's report drew attention to the fact that the 1967 Adult Occupational Training program had been initiated by order-in-council passed under the authority of an appropriation Act granting interim supply. This procedure had been followed because the Adult Occupational Training Bill would not be passed in time to prevent a gap from occurring between the expiration of the old program and the beginning of the new.[256] At that time the minister had agreed that "this is not the best procedure," and there had been critical debate in both houses of Parliament.[257] Discussion in the Public Accounts Committee was critical of the procedure but sympathetic toward the circumstances which had led to its adoption. Mr. Winch (N. D. P.) appeared to be the most perturbed.[258]

Paragraph 144 of the report noted that the Department of National Revenue had been following several practices "which are not supported by, or in accordance with, legislative authority."[259] Mr. Winch pointed out that this Committee had criticized the situation before, and he wanted "specific answers from the Department of National Revenue because in my estimation we are faced with blatant ignoring of the unanimous recommendations of our Committee over the years amounting to almost a contempt of this Committee."[260] However, Deputy Minister Labarge (Department of National Revenue) and Mr. Henderson pointed out that the problem was almost eliminated by amendments which had been made, or were in the offing, to the Customs Act and Excise Act.[261]

(k) Other occasions

Apart from Routine Proceedings which produced thirteen references to regulations, the only mention which was found outside of the categories already discussed occurred during the debate of a Government motion to appoint a joint committee on price stability. Baldwin condemned the Government for inaction with respect to the report of the Statutory Instruments Committee and professed his belief that nothing would be done.[262]

Of the references made during Routine Proceedings, only three were relevant to this study.[263] When Justice Minister Turner announced that the Government was referring to the Supreme Court of Canada the validity of the proclamation of the breathalyzer provisions of the Criminal Code, Woolliams charged that in proclaiming them before a suitable container had been developed for the breathalyzer test the Government had gone "beyond the powers this institution has given it . . . . This action is a typical example of rule by cabinet and not by Parliament."[264]

On February 26, 1970, after the business of the House had been announced, Baldwin asked Privy Council President Macdonald if he could "indicate when the government intends to bring forward in this House a proposal to implement the report of the Special Committee on Statutory Instruments which contains one antidote to the spreading poison of executive domination."[265] The Minister replied that it would not be before Easter.[266]

The third occasion was this long-awaited first official announcement of the Government's intention with respect to that report. Action to implement the Committee's recommendations would be of three kinds, Mr. Macdonald said:

> First, legislative action by Parliament to replace the existing Regulations Act by a new statutory instruments act; second, a number of cabinet directives to implement several of the recommendations which cannot be dealt with by general legislation and, third, amendment of the Standing Orders for the purpose of establishing a scrutiny committee to review regulations.[267]

Mr. Rondeau, speaking for the Ralliement Creditiste, said in a rather confusing response that his party was "satisfied" with the announcement.[268] Stanley Knowles[269] echoed the following sentiments expressed by Baldwin who, with a note of triumph, probably best summed up the feelings of those members who throughout the session had criticized the absence of parliamentary control of subordinate legislation. Baldwin said:

> Mr. Speaker, what the President of the Privy Council has said today bears out a maxim with which I became familiar in the early days of my practice of criminal law--that no matter how black the heart appears to be or how desperate the character there is always a glimmer of light and virtue if one waits long enough for it.
>
> I congratulate the President of the Privy Council on making this statement. We have been waiting for it a long time, but obviously when it comes to good things the period of gestation of this government . . . is very lengthy. For myself and for some others in the House it is the end of a ten-year period during which we have attempted to bring ourselves to a point at which we could hold up our heads and say that together with other democratic countries, particularly the countries of the Commonwealth, we have obtained some reasonable measure of ability to scrutinize statutory instruments and regulations.[270]

3. Other Opportunities within the Senate

Apart from the debates of bills, which have been considered above, senators made few comments relevant to subordinate legislation and its control except when they considered Senator Martin's motion to instruct the Standing Senate Committee on Legal and Constitutional Affairs to study the issue.

During the debate on the Throne speech, Senator O'Leary sounded a call to action:

> What this Senate could do is not merely to have a sober second thought about legislation which comes before it in bills, but also to find out what is being done behind the scenes, what is being done in an administrative way by Orders in Council. . . . [S]urely, before you can know what the Government really is up to, what the bureaucracy is up to, you have to look at several hundreds of those bills [sic] to see if they exceed the authority given to them by parliamentary statutes.
>
> I believe that the Senate is not examining government administration, that it is not examining government action, but that it is leaving itself in ignorance about government action, without examining what the Government does between and during sessions with its many Orders in Council. But more than that, what are the bureaucrats up to?
>
> . . . .
>
> If we are going to give sober second thought to government legislation, then let us cover as wide a field as possible and not restrict it to mere bills that come before us; and let us find out what is being done in the months of July and August when Parliament is not sitting. And when the bureaucrats and the few persons in the East Block are running the country by Orders in Council, are those orders hidden government? Are they based on legislation, or are the bureaucrats going further even than the powers that have been delegated to them? This is what I believe the Senate should do.[271]

In other words, an important future role of the Senate "would not be to protect the country or Parliament from the power of the Executive, but to protect the Executive from the growing power of the bureaucracy."[272] Shades of Lord Hewart!

A significant step in this direction was taken on February 18, 1970, when Senator Martin, Government Leader in the Senate, moved:

> That the Standing Senate Committee on Legal and Constitutional Affairs be instructed to consider and, from time to time, to report on procedures for the review by the Senate of instruments made in virtue of any statute of Parliament of Canada, and to consider in connection therewith any public documents relevant thereto.

Martin's intent was that the upper House study the recommendations of the Commons Statutory Instruments Committee and accept them, vary them, "or produce an entirely new report which it believes conforms more specifically to the wishes of this chamber."[273] The eighteen senators who participated in the eighty-page debate agreed that the resolution had merit, although they expressed varying degrees of urgency about the need for scrutiny. Grosart thought it "extraordinary . . . that it has taken this long for the Parliament of Canada to get around to this vital subject,"[274] and John Connolly said it was unfortunate that the House of Commons "beat us to the punch" in undertaking a study.[275]

Most of the speakers agreed that a scrutiny committee would be a check on the civil service where, O'Leary suggested, there is no countervailing influence analogous to that provided in Parliament by the opposition.[276] According to Senator Flynn:

> The power under a statute to make rules gives the civil servant with a knack for making capricious regulations the ideal opportunity to work out his latent megalomania on a defenseless public. Delegated legislation is a sort of blank cheque which affords the executive an opportunity of adding to or subtracting from the substance of the law.[277]

Mrs. Fergusson, however, had "very different feelings toward and about . . . the 'bureaucracy.'" Their aim is not, she said, "to take over the running of our country," but rather "to make the country run as smoothly as it can by their capable administration of the Acts passed by Parliament." They "have given years of dedicated unselfseeking service to this country and are continuing to do so."[278]

The debate ranged over a broad area and was liberally sprinkled with references to past Senate amendments curtailing delegations of power; to testimony presented to and recommendations made by the House of Commons Statutory Instruments Committee; to studies of the problem of control in Great Britain and elsewhere; and to the historical devolution of power from monarch to Parliament (especially in Great Britain) and now, according to some senators, from Parliament to the civil service.[279]

In addition, Senators Argue (Lib.) and Grosart criticized the Government for using an appropriation Act to authorize the making of regulations.[280]

Flynn and Grosart opposed the delegation of power to make regulations "generally for carrying out the purposes and provisions" of an Act, or which the Governor-in-Council "deems necessary," inasmuch as these phrases make difficult the determination of _vires_.[281]

Liberals Gouin and Croll urged that frequent contact with interested parties, or the holding of public hearings, be required when regulations are being made.[282] Mrs. Fergusson noted that regulations are generally _faites accomplis_ by the time they are published in the _Canada Gazette_,[283] and Senator Croll asked "who ever reads the _Gazette_ for regulations?"[284]

Lazarus Phillips and Grosart thought that the term "regulation" should be broadened to encompass instruments such as by-laws and administrative directives which were escaping the requirements of the Regulations Act.[285] Senators Carter (Lib.) and Gouin opposed the delegation of power to impose penalties.[286]

The accountability of boards and tribunals (including their procedures), and of Crown Corporations was an important issue for Lazarus

Phillips, Argue, Mrs. Fergusson, Carter, Martin, O'Leary, and L. Fournier.[287]

Although the House of Commons Statutory Instruments Committee had been divided on the best location of a scrutiny committee, it had concluded that its terms of reference precluded any recommendation other than of a Commons committee.[288] Senators were generally annoyed at this recommendation, and especially at the suggestion by some members of the Statutory Instruments Committee "that the non-elective and non-representative character of the Senate made it unsuitable for this role."[289] Martin, Grosart, Mrs. Fergusson, Carter, and John Connolly, favoured Senate scrutiny.[290] Thompson (Lib.) and Gouin wanted a joint committee; if the Commons would not agree, Gouin suggested, the Senate should establish its own committee even if its functions duplicated those performed in the lower House.[291] Senator Martin's motion carried on May 7, 1970.[292]

With the Honourable John Turner as its main witness, the Senate Committee on Legal and Constitutional Affairs met on June 17, 1970, to begin its study. Turner initially placed the question of scrutiny within the framework of a need "to balance the rights between the citizen and the state," a problem created by the "remoteness of governmental institutions, the inadequacy of methods of appeal, [and] the inadequacy of methods of even knowing what the law and the regulations are."[293]. The four aspects of this problem were: first, the enabling power contained in statutes; second (the one before this Committee), the opportunity to review regulations to ensure "that they do not offend some principles of parliamentary procedure or natural justice";

third, the question of citizens' rights in relation to the decisions of administrative tribunals; and fourth, the rules of procedure which these tribunals should adopt.[294]

Many of the fourteen pages of discussion consisted of Turner's elaboration of these four points to show their interrelationship and to indicate how the Government hoped to approach them. The new legislation and cabinet directives, to which Privy Council President Macdonald had referred the previous day in the House of Commons,[295] dealt with the first two points; the Federal Court Bill would cope with the third. There was as yet no specific proposal with respect to the fourth.[296] Turner also commented upon the incorporation within his Department of all legal officers from other departments (except External Affairs and National Defence) as an attempt to facilitate the Justice Department's handling, including drafting, of statutory instruments.[297] He also suggested that the proposed scrutiny committee "would want to watch," during the passage of bills, the extent of powers being delegated. He added that

> a committee of the Senate dealing with the substance of the statutes or a committee of the House of Commons dealing with the substance of the statutes might say that they do not like this power to make regulations and then we will refer it to the Scrutiny Committee.[298]

This is indeed an interesting statement, but one which neither he nor anyone else repeated during the debate on the Statutory Instruments Bill.[299]

The few points raised by senators referred primarily to the proposed scrutiny committee. Location was not an issue, inasmuch as

Turner noted that each house would decide how it wished to proceed.[300] Acting Chairman Lazarus Phillips thought it might be appropriate for a House of Commons committee to consider regulations, and a Senate committee to "consider the supplementary aspects of administrative agencies, crown corporations, and the like, so that the whole subject matter of administrative action resulting from legislation will be dealt with."[301]

The only other matter about which Turner was queried was that of an ombudsman. He said that, while his mind was still open, he had reservations about the propriety of such an office. Any need for an ombudsman would, he thought, diminish as administrative and judicial remedies became more adequate.[302]

The Legal and Constitutional Affairs Committee had planned to pursue its study and to call MacGuigan as its next witness.[303] Before this happened, however, the Statutory Instruments Bill was before Parliament and the Committee's attention focused on it.

The only other relevant discussion in the Senate took place when the Standing Committee on National Finance considered the supplementary estimates "B". Chairman Leonard expressed concern about the words "in accordance with such regulations as may be made by the Governor in Council" which appeared in Vote 36b of the Department of Trade and Commerce.[304] Senator Lazarus Phillips asked J. L. Fry (Assistant Secretary of the Functional Branch of the Treasury Board) whether, "when the Governor in Council will prescribe a regulation, such regulation will be guided by reference to a particular statute now in existence or will it depend purely on the views of the Governor in Council." Mr.

Fry suggested that the Governor-in-Council "will have freedom to make regulations as he sees fit." "In other words," Phillips persisted, "freedom to make regulations without reference to any existing statute." Fortunately, Senator Grosart helped to prevent a serious misunderstanding by interjecting: "except this one." Phillips said he was interested because "we are dealing with the whole subject matter of statutory instruments in both houses of Parliament and this is an interesting example of a procedure which is inviting some criticism."[305] The topic was not pursued.

There were no discussions of tabled documents, no relevant inquiries during question periods, no use made of Rule 46(g),[306] and no relevant discussion during special studies of standing committees, the proceedings of special committees, or the proceedings of joint Senate-House of Commons committees.[307]

Footnotes

[1] S. C. 1969-70, cc. 14, 16, 17.

[2] Ibid., cc. 18, 22, 38, 43.

[3] Senate Debates, November 20, 1969, p. 189.

[4] Ibid., December 2, 1969, p. 254.

[5] Canada, Parliament, Senate, Standing Committee on Banking, Trade and Commerce, Proceedings, November 19, 1969, p. 1:12. The affirmative reply was made by R. Humphries, Superintendent of Insurance, Department of Finance, and the matter was not pursued. (Later references in this Appendix to Senate standing committees are to "Senate Committee on. . . .")

[6] Senate Committee on Banking, Trade and Commerce, Proceedings, November 26, 1969, p. 2:14. These presumptions were confirmed by G. M. McNabb, Assistant Deputy Minister, Energy Development, Department of Energy, Mines and Resources.

[7] Senate Debates, January 28, 1970, pp. 429-30.

[8] Ibid., p. 431.

[9] Ibid., p. 432.

[10] Senate Committee on Health, Welfare and Social Affairs, Proceedings, February 5, 1970, p. 3:11.

[11] Senate Debates, February 10, 1970, p. 525. The allegation was, of course, denied.

[12] Senate Committee on Transport and Communications, June 10, 1970. For the text of the amendment, see Senate Debates, June 11, 1970, p. 1211.

[13] S. C., 1969-70, cc. 16, 17, 22, 34, 37, 38. In addition, Mr. Haidasz noted during second reading debate of the Radiation Emitting Devices Bill (c. 37) that "there will be ample opportunity for discussion with manufacturers as to any modifications necessary to meet the standards proposed. (H. of C. Debates, March 6, 1970, p. 4483.) During committee consideration of the Yukon Placer Mining Bill (c. 38), the Yukon Chamber of Mines opposed the discretion given the cabinet to determine when land would be required under this amendment to the parent Act. A. D. Hunt (Acting Assistant Deputy Minister, Northern Development) replied that "the administration has no intention of being unreasonable in the withdrawal of land. . . . I am sure that this section, if approved, will be used with discretion." (Canada, Parliament, House

of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, April 16, 28, 1970, pp. 11:40-42, 14:7.) Later references in this Appendix to House of Commons standing committees are to "Commons Committee on . . . , Minutes."

[14] Commons Committee on Finance, Trade and Economic Affairs, Minutes, February 12, 1970, p. 20:19.

[15] H. of C. Debates, February 13, 1970, pp. 3592, 3598.

[16] Commons Committee on Health, Welfare and Social Affairs, Minutes, February 12, 1970, p. 4:26.

[17] H. of C. Debates, January 30, 1970, pp. 3042-43. Baldwin could have noted that the Quarantine Act which this Bill would replace contained much more delegation.

[18] Ibid., June 26, 1970, p. 8654. Baldwin was referring to the June 16 statement by the Honourable Donald Macdonald.

[19] Senate Debates, March 23, 1970, p. 764. The Senator was referring specifically to Section 22 which authorized the cabinet to make regulations exempting regions, or classes of fish, from the Bill's provisions dealing with interprovincial or export trade.

[20] H. of C. Debates, November 5, 6, 1969, pp. 538, 572, 597.

[21] Ibid., December 4, 1969, pp. 1595, 1599, 1621.

[22] Ibid., March 6, 1970, p. 4491.

[23] Ibid., p. 4492. This Bill did not contain such a regulation-making power although the parent Act did allow the minister (with cabinet approval) to make regulations relating to matters "deemed necessary" for the efficient administration of the Act. (R. S. C., 1952, c. 5, s. 4[1][c].) Danforth offered no proof of his allegation that most regulations are made when Parliament is not sitting.

[24] Commons Committee on Transport and Communications, Minutes, November 18, 1969, p. 1:53.

[25] Ibid. Kierans added that the criticism did not apply to this Bill because the regulations were already in force.

[26] Ibid.

[27] Ibid., p. 1:54.

[28] H. of C. Debates, March 24, 1970, pp. 5409-10. This was Vote 17b of the Department of Agriculture estimates, and part of the Appro-

priation Act No. 1, 1970. Baldwin also said that "it is a very dangerous practice and a serious situation can be created where any motley collection of tinsel autocrats and sawdust Caesars, through the use of this method, would be able to virtually impose their financial will upon this parliament and the country without safeguards which are so essential to the legislative process." (P. 5409.)

[29] *Ibid.*, pp. 5425, 5440.

[30] *Ibid.*, January 30, 1970, pp. 3048, 3052. See *S. C., 1969-70*, c. 40, s. 7.

[31] Commons Committee on Justice and Legal Affairs, *Minutes*, April 15, 1970, p. 20:33.

[32] *Ibid.*, p. 20:34.

[33] *H. of C. Debates*, February 6, 1970, p. 3317.

[34] Commons Committee on National Resources and Public Works, *Minutes*, April 14, June 10, 1970, pp. 17:11, 17:38-39, 36:21.

[35] *Ibid.*, pp. 17:11, 36:21.

[36] *H. of C. Debates*, February 6, 1970, p. 3317. Commons Committee on National Resources and Public Works, *Minutes*, June 10, 1970, pp. 36:22-24.

[37] Commons Committee on National Resources and Public Works, *Minutes*, June 10, 1970, p. 36:24.

[38] *Senate Debates*, June 23, 1970, p. 1329.

[39] Commons Committee on Northern Development and Indian Affairs, *Minutes*, May 7, 1970, p. 17:23.

[40] *Ibid*. However, the Northern Inland Waters Bill, which had already passed the committee stage, designated a specific minister (Indian Affairs and Northern Development) to be responsible for its administration.

[41] *H. of C. Debates*, May 1, 1970, p. 6480. In reply, Consumer and Corporate Affairs Minister Basford stated that he hoped proclamation would immediately follow the Royal Assent. (Pp. 6487-88.)

[42] *S. C., 1969-70*, cc. 64, 52, 69.

[43] *H. of C. Debates*, February 23, 1970, p. 3963.

[44] *Ibid.*, p. 3973.

[45] *Ibid.*, p. 3989. He added: "I do not think any man is sensible enough to make these decisions by himself. If I were a minister of justice I would want to share this responsibility with a well-informed committee of the House." (P. 3992.)

[46] *Ibid.*, p. 3996.

[47] Commons Committee on Justice and Legal Affairs, *Minutes*, April 21, 1970, p. 22:29.

[48] *Ibid.*, p. 22:31.

[49] *Senate Debates*, June 3, 1970, p. 1152.

[50] *Ibid.*, June 9, 1970, p. 1191.

[51] *Ibid.* The Senator did not explain the meaning of his statement.

[52] *Ibid.*, pp. 1182-83. See below, pp. 354-357.

[53] Commons Committee on National Resources and Public Works, *Minutes*, May 5, 1970, pp. 28:57-58. Part III was added by Government amendment at the Committee stage, and permitted the cabinet to make regulations for controlling nutrients.

[54] *Ibid.*, p. 28:58. The first part of his statement was incorrect in that the Bill still had to pass both houses before "it is gone." The amendment was moved on p. 28:88.

[55] *Ibid.*, p. 28:64.

[56] *Ibid.*, p. 28:95.

[57] *Ibid.*, p. 28:99. New Democrats Harding and Mrs. MacInnis were not impressed with Greene's arguments. (Pp. 28:99-100, 28:104-105.)

[58] *H. of C. Debates*, June 2, 3, 1970, pp. 7616-21, 7695.

[59] Commons Committee on National Resources and Public Works, *Minutes*, May 5, 1970, p. 28:47.

[60] *Ibid.*, April 29, May 5, 1970, pp. 24:9, 28:48.

[61] *Ibid.*, May 4, 1970, p. 27:10. The amendment carried. (Pp. 27:25-26.)

[62] *Ibid.*, April 29, May 1, 1970, pp. 24:21, 24:39, 26:24. (Sec-

tions 4, 5, 11 of the Bill.)

[63] Ibid., May 1, 1970, p. 26:24. One amendment was approved. (April 29, 1970, p. 24:39.) The other two were withdrawn, one because a province could not be compelled to enter into an agreement (April 29, 1970, p. 24:24) and the other (to which Dr. Ollivier had specifically addressed his comments) because the Governor-in-Council could not be compelled to act on a minister's recommendation. (May 1, 1970, p. 26:25.)

[64] H. of C. Debates, June 4, 1970, p. 7728.

[65] Ibid. The Speaker's ruling was made on the grounds of relevancy and the requirement that financial initiative rests with the Crown.

[66] Senate Committee on Health, Welfare and Science, Proceedings, June 18, 1970, pp. 10:34-60. The amendment which added Part III had been brought before the Commons Standing Committee on National Resources and Public Works after representatives of industry had appeared. Even though several firms had requested the privilege of appearing again, that Committee refused it. (Minutes, May 6, 1970, p. 29:19.)

[67] Senate Committee on Health, Welfare and Science, Proceedings, June 18, 1970, p. 10:61.

[68] Ibid., p. 10:62. It is unclear whether the Senator was referring to the Senate Standing Committee on Legal and Constitutional Affairs or if he was anticipating the establishment of a scrutiny committee.

[69] Ibid.

[70] Ibid., p. 10:63; Senate Debates, June 18, 1970, p. 1275.

[71] Ibid.

[72] Ibid. When he secured this agreement in Committee (June 18, 1970, p. 10:66) he added the statement, but did not explain it, that the Committee would then be "a constant public forum, which obviates the necessity for amendment of the bill."

[73] H. of C. Debates, May 13, 1970, p. 6935.

[74] Ibid., p. 6936. Evidently, Turner had forgotten that Transport Minister Jamieson had earlier placed before the House twenty-nine regulations which his Department had established for immediate use in the event that the Motor Vehicle Safety Bill was passed. (Ibid., January 29, 1970, pp. 2996, 3016.) See below, p. 310.

[75] *Ibid.*, May 13, 1970, p. 6943.

[76] *Ibid.*, p. 6946.

[77] Commons Committee on Indian Affairs and Northern Development, *Minutes*, June 2, 1970, pp. 23:52-54. Whether the Committee would see the regulations before or after they were proclaimed would depend upon the time factor, Mr. Chrétien said, but if the Committee's recommendations "are good," he would be glad to change the regulations "before or after proclamation." (P. 23:60.)

[78] *Ibid.*, p. 23:55.

[79] *Ibid.*, pp. 23:57-58.

[80] *Ibid.*, p. 23:59.

[81] *Ibid.*, June 2, 11, 1970, pp. 23:65, 27:67-68. Nielsen had withdrawn, in favour of this amendment, a proposed amendment which would have required that a council recommendation precede the making of regulations by the cabinet. (Pp. 27:66-67.) A later amendment proposed by the Yukon member which would have required approval, by the Commissioner-in-Council, of cabinet regulations was negatived. (Pp. 27:68, 27:70.)

[82] *Ibid.*, June 9, 11, 1970, pp. 26:69 and 27:57. The amendments were moved by Nielsen and Orange. Earlier attempts by Barnett to withdraw the power of dissolution, and Mr. Yewchuk (Cons.) to make dissolution contingent upon council approval, were in vain. (Pp. 26:36, 26:50-51, 26:60.)

[83] *Senate Debates*, June 23, 1970, p. 1345.

[84] Motor Vehicle Safety Bill, c. 30; Criminal Code (Hate Propaganda) Bill, c. 39; Expropriation Bill, c. 41; Fisheries Bill, c. 63; Corporations Bill, c. 70.

[85] *H. of C. Debates*, January 29, 1970, p. 2996. These standards were also appended to the *Debates*, of that day. (P. 3016.)

[86] Commons Committee on Transport and Communications, *Minutes*, March 3, 1970, p. 13:16.

[87] *Ibid.*, p. 13:19.

[88] *Ibid.*, February 24, 1970, p. 11:66.

[89] *Ibid.*, March 3, 1970, p. 13:17.

[90] *Ibid*., p. 13:60. This requirement applied to Section 9, but not to Section 15 which was the general regulation-making power; and yet, the latter Section passed the Committee without comment. (P. 13:86.)

[91] *Ibid*., p. 13:31.

[92] *Ibid*., pp. 13:31-32.

[93] *Ibid*., p. 13:33.

[94] Senate Committee on Transport and Communications, *Proceedings*, March 19, 1970, p. 3:9.

[95] *H. of C. Debates*, November 17, 1969, p. 897.

[96] *Ibid*., April 6, 1970, p. 5544. See, also, Woolliams' comments in the Commons Committee on Justice and Legal Affairs, *Minutes*, March 3, 1970, pp. 12:62-63.

[97] *H. of C. Debates*, April 6, 1970, p. 5523.

[98] *Senate Debates*, May 5, 1970, p. 974.

[99] *H. of C. Debates*, November 7, 1969, p. 654.

[100] Commons Committee on Justice and Legal Affairs, *Minutes*, December 2, 1969, p. 4:34.

[101] *Ibid*., p. 4:19.

[102] *Ibid*., December 16, 1969, p. 5:37.

[103] *Ibid*., p. 5:39. Turner acknowledged that there would be no appeal from a hearing officer's decision. (P. 5:40.)

[104] *Ibid*., pp. 5:38, 5:40.

[105] *Senate Debates*, February 18, 1970, p. 574.

[106] See above, pp. 305-306.

[107] Commons Committee on Fisheries and Forestry, *Minutes*, April 30, 1970, pp. 19:13-17, 19:31, 19:34-35.

[108] *Ibid*., p. 19:18.

[109] *Ibid*., May 7, 12, 1970, pp. 21:24, 22:23.

[110] *Ibid*., May 12, 1970, p. 22:22.

[111] *Ibid.*, p. 22:55.

[112] *Ibid.*, May 7, 12, 1970, pp. 21:16-20, 22:83. See *S. C., 1969-70*, c. 63, s. 3(12).

[113] *Ibid.*, May 7, 1970, p. 21:34. Davis replied that ministerial actions had, in fact, been embodied in orders-in-council: "They are not purely ministerial decrees." (P. 21:35.) Barnett had earlier raised the matter when the Department's estimates were before the Committee. (See below, p. 345 and n. 228.) His Bill C-219, which did not progress beyond first reading, would have repealed Section 7 of the parent Act.

[114] *Ibid.*, p. 21:34.

[115] *Ibid.*, May 12, 1970, p. 22:20.

[116] *Ibid.*, pp. 22:84-86.

[117] This change in Section 34(g) was also contained in Barnett's Bill C-219. The notes accompanying that Bill did not state the reason for changing "prescribing" to "respecting."

[118] *H. of C. Debates*, June 26, 1970, pp. 8669-70, 8659-60.

[119] *Senate Debates*, June 26, 1970, p. 1402.

[120] *Ibid.*, p. 1407. While the reply was interesting, it did not answer the question. Senator Phillips persisted: "My question was simply this: Will the regulations under 34B [s. 5 of the Bill] be referred to a Senate committee for study before being put into effect?" Senator Martin said: "I have already explained that it was not the intention to move that it be sent to a committee." (P. 1408.) He must have been speaking of the Bill, and at this point Senator Phillips gave up.

[121] *H. of C. Debates*, November 25, 1969, p. 1239.

[122] *Ibid.*, November 26, 1969, p. 1294. Hon. Herb Gray replied that the reason was to avoid possible double taxation because of similar taxes imposed by the United States on Canada-United States flights. (P. 1294.)

[123] *Senate Debates*, December 17, 1969, p. 368.

[124] Senate Committee on Banking, Trade and Commerce, *Proceedings*, December 18, 1969, p. 4:12. The explanation was given by F. R. Irwin, Director, Tax Policy Division, Department of Finance. (P. 4:12.)

[125] *H. of C. Debates*, November 10, 1969, January 13, 1970, pp. 712, 2316.

[126] Commons Committee on Finance, Trade and Economic Affairs, *Minutes*. See, for example, February 26, March 3, 1970, pp. 23:46-51, 24:15, 24:127, 24:134. Marcel Lambert's concern was expressed on p. 21:50. (February 17, 1970.)

[127] *Senate Debates*, June 17, 1970, p. 1266. Mr. Mather (N. D. P.) made his comment in the Commons Standing Committee on Miscellaneous Estimates, *Minutes*, June 4, 1970, p. 28:35.

[128] Commons Committee on Transport and Communications, *Minutes*, May 12, 1970, p. 26:127.

[129] *Senate Debates*, October 6, 7, 1970, pp. 1462, 1463, 1474.

[130] *H. of C. Debates*, March 3, 1970, p. 4322.

[131] *Senate Debates*, May 21, 1970, pp. 1081-82.

[132] Commons Committee on Indian Affairs and Northern Development, *Minutes*, April 16, 1970, pp. 11:15-18. The objector was Mr. Norman Chamberlist.

[133] *H. of C. Debates*, April 22, June 4, 1970, pp. 6177, 7752.

[134] Commons Committee on External Affairs and National Defense, *Minutes*, May 19, 1970, p. 30:20. The amendment was defeated. (P. 30: 54.)

[135] *Senate Debates*, June 11, 17, 1970, pp. 1214, 1251, 1254.

[136] Mr. Speaker Lamoureux ruled that the Bill involved the disposition of public funds and therefore must originate in the House of Commons. See *H. of C. Debates*, November 10, 12, 1969, pp. 668-73, 727-28. Bill C-161 replaced S-3 and became law.

[137] *H. of C. Debates*, February 4, 10, 24, 1970, pp. 3225-26, 3446, 4029.

[138] *Ibid.*, February 10, 1970, p. 3430.

[139] *Ibid.*, February 11, 16, 1970, pp. 3499, 3648-49.

[140] *Ibid.*, February 16, 1970, p. 3649. His suggestion would remove the subjectivity in the delegation, and yet he added this peculiar statement: "I think the 'proper carrying out' is something which should be left to the discretion of the cabinet." (Might he have meant "should not be left"?) For the reference made to the Statutory Instruments Committee, see that Committee's *Third Report*, pp. 39-40.

[141] Ibid., March 25, 1970, pp. 5470-71.

[142] Ibid., p. 5471.

[143] Commons Committee on Justice and Legal Affairs, Minutes, May 7, 1970, p. 26:22.

[144] H. of C. Debates, March 25, 1970, p. 5474. When Turner appeared before the Senate Standing Committee on Legal and Constitutional Affairs in relation to that Committee's study of statutory instruments, he elaborated upon this and other "steps." See below, pp. 357-358.

[145] Ibid., p. 5476.

[146] Commons Committee on Justice and Legal Affairs, Minutes, May 7, 1970, p. 26:22.

[147] Ibid., June 9, 1970, pp. 33:93 ff.

[148] H. of C. Debates, April 14, 1970, p. 5871.

[149] Ibid., April 27, 1970, p. 6330.

[150] Ibid., p. 6336.

[151] Ibid., May 14, 1970, p. 6994.

[152] Ibid., May 6, 1970, p. 6659.

[153] Ibid., May 19, 1970, pp. 7096-97.

[154] Commons Committee on Agriculture, Minutes, September 29, 1970, pp. 49:12, 49:68. An interesting exchange took place between H. E. Harris, solicitor for the Canadian Broiler Council, and Mr. Danforth (Cons.) on the matter of exemption from provisions of the Act. Harris: "You would have to say the Governor in Council shall not exempt any province or region of Canada on the regulations on any marketing plan without what? That is my problem, without doing what?" Danforth: "They might for a change try to bring it before Parliament." Harris: "I do not think much would be accomplished by that." (September 23, 1970, pp. 47:85-86.)

[155] H. of C. Debates, April 13, 1970, p. 5815. At the report stage, however, he concluded that this was a workable Bill which "will adequately serve the interests of the farmers in western and eastern Canada." (October 7, 1970, pp. 8887-88.)

[156] Ibid., April 14, 1970, p. 5845.

[157] Commons Committee on Agriculture, Minutes, May 19, 21, 1970, pp. 32:9-10, 33:11. No one pointed out that Section 15(5) allowed

the Minister to shorten the eight-month delay if he believed such action would benefit exports.

[158] *Ibid.*, pp. 32:21-22.

[159] *Ibid.*, June 26, 1970, pp. 45:127, 45:161-66. Danforth wanted assurance that the regulations would come to Parliament's attention. Olson replied that this would be automatic inasmuch as they had to be published in the *Canada Gazette*, "and we could make a note of the interest of some members and it would just be a matter of our trying to find the note at the right time so that members would be advised. We will make a note to see that all members of Parliament are advised when this proclamation is issued." (P. 45:165.) The Minister appeared to be somewhat more cooperative than he had been in his discussion with George Muir.

[160] *H. of C. Debates*, October 6, 1970, p. 8851. This was notice of motion number 43. (For the text of the amendment see *Routine Proceedings and Orders of the Day*, No. 155 [October 7, 1970], p. x.) At least three others (numbers 16, 24, 26) proposed by Mr. Horner (Cons.), would have changed the recipient of delegated authority from the Commission to the Minister or Governor-in-Council. See *Routine Proceedings*, pp. vii-viii. Of the forty-four notices, thirty-seven stood in Horner's name.

[161] Olson, for example, in relation to this Bill. (See above, pp. 325-326.) Also, Kierans (above, p. 299), Greene (above, p. 307), Chrétien (above, p. 309), and Jamieson (above, p. 311).

[162] For example, H. W. Arthurs. (Statutory Instruments Committee, *Minutes*, April 22, 1969, pp. 13-14.)

[163] Nine of the private members' bills were amendments to the Electoral Boundaries Readjustment Act; the tenth was a Bank Act amendment. All passed both houses with scarcely any comment.

[164] *H. of C. Debates*, November 25, 1969, pp. 1214-17.

[165] *Ibid.*, p. 1217.

[166] See above, p. 179.

[167] *H. of C. Debates*, November 24, 1969, pp. 1176-77; *Senate Debates*, December 2, 1969, p. 261; Senate Committee on Banking, Trade and Commerce, *Proceedings*, December 3, 1969, p. 3:9. Evidently, Senator Hayden did not fully realize that the Customs Tariff Act already required the affirmation of cabinet orders, for he said that, because the idea of confirmation was now acceptable to the Government, the Senate should insert such a provision in the Hazardous Products Act when it was next before Parliament. Apparently, the Senate had tried to do

this during the previous session but had been told that this would be unacceptable. (Senate Debates, December 2, 1969, p. 261.)

[168] Commons Committee on Transport and Communications, Minutes, June 2, 1970, pp. 30:8-10.

[169] H. of C. Debates, June 10, 1970, pp. 7980-84.

[170] Ibid., p. 7982. He offered to withdraw the motion (p. 7984) in exchange for a Government undertaking that the Statutory Instruments Committee's recommendations would be implemented "within a limited time." Hansard does not indicate the fate of this amendment, but judging from the Speaker's comments (pp. 7983-84) it probably was ruled out of order.

[171] Senate Debates, June 23, 1970, pp. 1339-40.

[172] Ibid., June 25, 1970, p. 1377. Whether Senator Yuzyk's assertion (p. 1377) that the "excellent debate" in the Senate on statutory instruments did in fact "make Canadians aware that this field must be thoroughly reviewed," is open to question.

[173] Ibid., pp. 1377-78.

[174] Commons Committee on Fisheries and Forestry, Minutes, February 17, 1970, pp. 4:74-77.

[175] Ibid., pp. 4:14, 4:36, H. of C. Debates, February 25, 1970, pp. 4097, 4101. The amendments were lost.

Broadening the definition of "fishing vessel" implied a broadening of the power delegated to the cabinet to control the entry of this type of ship into Canadian fishing ports. However, this fact was mentioned only in passing by the Minister of Fisheries and Forestry in the Commons (Debates, January 23, 1970, pp. 2765-66) and in Committee (p. 4:11); by Senator Smith who introduced the Bill in the upper House (Debates, March 12, 1970, p. 708), and by Assistant Deputy Minister R. R. Logie in the Senate Committee on Banking, Trade and Commerce. (Proceedings, March 18, 1970, p. 12:11.)

[176] Commons Committee on Labour, Manpower and Immigration, Minutes, June 10, 1970, p. 9:18. Mackasey thought the new power could be given to either the cabinet or the Minister. (P. 9:26.) Knowles' amendment (p. 9:10) was lost. (P. 9:29.)

[177] Ibid., pp. 9:30-31.

[178] H. of C. Debates, November 14, 1969, p. 852. The Bill permitted exceptions to this rule "where these would be in the public interest." (P. 852.)

[179] That Committee had agreed with Professor Rowat that administrative secrecy "is based on an earlier system of royal rule in Britain that is unsuited to a modern democracy in which the people must be fully informed about the activities of their government." (D. C. Rowat, "How Much Administrative Secrecy," *Canadian Journal of Economics and Political Science*, XXXI [1965], 480, quoted in Statutory Instruments Committee, *Third Report*, p. vii.) The Committee stated five arguments to support its view that deviation from the principle of disclosure should require justification. (*Third Report*, pp. vii-viii.)

[180] *H. of C. Debates*, November 14, 1969, p. 857.

[181] *Ibid.*, January 13, 1970, pp. 2324-28. He was to mention the Government's program later during consideration of the Justice department's estimates and when the Senate Committee on Legal and Constitutional Affairs began its study of statutory instruments. See below, pp. 346, 358.

[182] *Ibid.*, p. 2330. Knowles acknowledged that the Bill had defects, but he thought that second reading should be granted to permit further study by the Justice and Legal Affairs Committee. One of the defects was the omission of provision for an ombudsman's salary, a necessary omission for a private member's bill. Thompson's second bill sought to overcome this problem by expanding the functions of the auditor general to include those of ombudsman. In other respects the two bills were almost identical.

[183] *Ibid.*, October 6, 1970, pp. 8830-31.

[184] *Ibid.*, pp. 8831-35.

[185] *Ibid.*, October 27, 1969, p. 134. Baldwin did not attempt to verify his 90 per cent figure. He also took some credit for the establishment of the Statutory Instruments Committee: "I was very happy that my advocacy, coupled with certain pressures a year ago, was effective and I was successful in persuading the government to set up this committee." (P. 134.) When Baldwin spoke, the *Third Report* of the Statutory Instruments Committee had just been tabled the week before (at the close of the previous session). His initial enthusiasm was soon to be replaced by discouragement with Government inaction upon the recommendations.

[186] *Ibid.*, November 3, 1969, p. 460.

[187] The members who asked more than one question were Mather, Lewis, and Broadbent (all N. D. P.), who asked two questions each; Gleave, Harding, Burton (all N. D. P.), and Nesbitt (Cons.), who asked three questions each; Stanfield (Leader of the Opposition), who asked eight questions; and N. D. P. leader T. C. Douglas, who asked nine questions. No question was asked by a member of the Ralliement Creditiste.

[188] T. C. Douglas was refused Government assurance that committee discussion and interest group representations would precede the effective date of regulations. A question by Burton, the second part of a larger inquiry, was not answered. (H. of C. Debates, December 9, 1969, March 19, 1970, pp. 1743, 5216.) Hon. Jack Davis, Minister of Fisheries and Forestry, replied to Douglas.

[189] On one occasion the following exchange occurred (H. of C. Debates, April 30, 1970, p. 6449):

Burton asked Hon. Otto Lang (Minister in charge of the Wheat Board) if the "proposed regulations" to operate the Government's acreage reduction program (LIFT - Lower Inventory for Tomorrow) "have been discussed with the farm organizations and, if so, which farm organizations."

Lang: "The regulations are in force. Of course, the pattern of effect of the regulations upon farmers has been discussed very widely throughout the country with most farm organizations."

Burton: "If these regulations are in force, can the minister make them available to members of this House and, more important, to the farmers of western Canada?"

Lang said he would "be glad to do that."

Rt. Hon. John Diefenbaker, accusing the Government of an attitude "of contempt" toward these farmers, commented that they "do not know where in blazes they are going because the regulations have not been made available to them."

[190] Ibid., February 26, 1970, p. 4115. Justice Minister Turner answered in the affirmative.

[191] Ibid., October 31, 1969, pp. 349-50. The question "is argumentative," replied Trudeau.

[192] Ibid., March 17, 1970, p. 5106. These regulations, called "requirements," are on pp. 5156-57.

[193] These questions and answers are quoted here to understand better the concern of Baldwin and Brewin.

January 30, 1970, p. 3025. Baldwin: "Is it the intention of the government to move shortly to implement the very important proposals and recommendations of the Special Committee on Statutory Instruments?" Hon. Donald Macdonald (President of the Privy Council): "We have had the proposals under consideration, and a draft proposal is now being completed which I hope will be available to the House before the end of the session." Baldwin: "Would the Prime Minister use what influence he has with the President of the Privy Council to speed up the process, and would he take into account the very alarming and dangerous increase in executive dictatorial powers contained in recent government legislation and the need to provide countervailing supervisory powers to Parliament?" (The reply was as facetious as the question was argumentative.)

February 4, 1970, p. 3207. Brewin: "Can the minister [of Justice, Mr. Turner] say whether the government proposes to take any action, and if so how soon, with a view to implementing the report [of the Statutory Instruments Committee] and some of its recommendations?" Turner: "The Department of Justice is currently drafting a proposal which we [he and Mr. Macdonald] want to discuss together and present to our colleagues."

February 4, 1970, p. 3208. Baldwin: "Would the Prime Minister discuss with the President of the Privy Council the question of referring to the Standing Committee on Procedure and Organization ways and means of permitting members on both sides of the House to combat the very alarming and dangerous increase in executive power?" (The question was not answered.)

March 23, 1970, p. 5343. Baldwin: "Could the hon. gentleman [Mr. Macdonald] indicate when he is proposing to bring forward for consideration by this House the report of the Committee on Statutory Instruments which recommends certain protection against arbitrary ministerial actions?" (The question was not answered.)

April 6, 1970, p. 5516. Baldwin: "In view of the problems created by . . . [the] excessive use of executive power, would the minister [Mr. Macdonald] arrange to bring forward for discussion and decision at an early date the recommendations of the committee on statutory instruments . . . ?" (The question was not answered.)

May 26, 1970, p. 7328. Baldwin: "In view of the fact that the other place has now established a committee to examine the question of government regulations, is it a fact that the government has abandoned all idea of implementing the very excellent report of the special committee which suggested that supervision should be exercised in this chamber?" Macdonald: "It is not a fact, Mr. Speaker. We expect to be making a statement, before the end of the session in June, on the statutory changes that will be necessary to apply the report prepared by the parliamentary committee." Baldwin: "Apart from making a statement, is it the government's intention to do anything in a concrete way to implement any of the report's recommendations before the session is over?" Macdonald: "Mr. Speaker, we have about 17 or 20 bills on the Order Paper now. If we could pass those quickly we could bring on this other matter."

June 2, 1970, p. 7595. Baldwin: "Mr. Speaker, I should like to ask the Acting Government House Leader [Hon. Allan MacEachen] if he can give a categorical assurance that the report of the Special Committee on Statutory Instruments presented some time ago will be implemented this session in time to become effective at the beginning of next session?" MacEachen: "No, Mr. Speaker." Baldwin: "Will the Acting House Leader or the real thing--I mean the permanent House Leader when he comes along--make a short statement indicating why the government is afraid to implement the Committee's proposals which impose such a wholesome restraint upon excessive and dictatorial government authority?" (The Speaker ruled the question out of order.)

June 2, 1970, p. 7596. Brewin: "Can the Acting House Leader state the reason for the delay in implementing this report?" MacEachen:

"Mr. Speaker, I would have to be in touch with 'the real thing' for that answer."

[194] *H. of C. Debates*, June 16, 1970, pp. 8155-58.

[195] *Ibid.*, November 19, 1969, p. 985, Question No. 15. The answer was as follows:

1950	1955	1960	1963	1964	1966	1967	1968
15,121	3,963	3,674	3,757	3,994	4,827	4,056	3,582
			-of which				
8,938	2,116	1,877	1,836	1,951	2,364	1,654	1,230

were Treasury Board Minutes approved by the Governor-in-Council.

Nine of the thirteen questions were asked by N. D. P. members (Harding, 3; Knowles, 2; Skoberg, 2; Mather, 2), three by Conservatives (Diefenbaker, Mazankowski, Forrestall), and 1 by Liberal Goode.

[196] *Ibid.*, May 8, 1970, p. 6733.

[197] *Ibid.*, p. 6734. Several other occasions when C. R. T. C. decisions were criticized in the House are noted in this Appendix. See note 235 for criticism during the ten o'clock adjournment debate on January 13, 1970; and note 237 and pp. 349-350, for cricitisms during the January 15 and April-June discussions by the Committee on Broadcasting, Films and Assistance to the Arts. The Speaker was referring to the latter Committee discussion.

The Speaker denied permission thirty-six times, usually on the grounds of no urgency or the availability of other opportunities to raise the issue.

[198] *Ibid.*, February 5, 1970, p. 3230. This request was also made during the previous day's question period. (February 4, 1970, p. 3208.) See n. 193.

[199] *Ibid.*, June 2, 1970, pp. 7592-93.

[200] See n. 193.

[201] All but three moved by Southam (Cons.) came from the New Democratic Party (Rose, 7; Orlikow, 5; Broadbent, 4; Mrs. MacInnis, 3; Knowles, 2; Barnett, Harding, Lewis, Mather, Saltzman, 1 each).

[202] *H. of C. Debates*, November 1969, p. 999.

[203] See below, pp. 341-342.

[204] *H. of C. Debates*, December 17, 1969, p. 2084. This was probably the directive which had caused much discussion when the Department of Manpower and Immigration had appeared before the Statutory Instruments Committee. (See the *Minutes* of that Committee, June 26, 1969.)

[205] Ibid., November 19, 1969, p. 999. For the debate on the motion see below, pp. 340-341.

[206] Eighteen Mondays, sixteen Tuesdays, nineteen Thursdays, and twelve Fridays.

[207] For the texts of the resolutions see Votes and Proceedings, No. 155 (October 7, 1970), pp. 44-54. Of the three relevant ones not considered by the House, number 29 (Goode, Lib.) asked the Government to amend regulations under the Income Tax Act; number 30 (Chappell, Lib.) asked the Government to direct the C. R. T. C. to hold public hearings in a specific situation. Because number 40 (Fortin, R. Cred.), dated October 31, 1969, related to issues discussed during the session, it is quoted here:

"That, in the opinion of this House, a Special Committee on Administrative Courts should be appointed to consider the various Acts establishing bodies with jurisdictional, judicial or quasi-judicial functions to report to this House on the advisability of legislation respecting administrative courts and more particularly to consider:

. . . .

(c) the procedures to be followed in such administrative courts, in order that the rights of the persons under their jurisdiction be protected, and to establish more uniform procedures;

(d) the advisability of establishing a court of appeals from the trial administrative courts;

(e) the advisability of appointing an ombudsman or of devising a method to protect the rights of citizens in an ever encroaching administration."

[208] H. of C. Debates, November 17, 1969, pp. 897-906. The resolution was talked out.

[209] Ibid., January 19, 1970, pp. 2547-55. The resolution was talked out.

[210] Ibid., March 23, 1970, p. 5360. Stewart also sponsored thirty-seven bills (C-228 through C-264) to provide for these appointments. None went beyond first reading.

[211] Ibid., pp. 5365-66. The resolution was talked out.

[212] Ibid., April 27, 1970, pp. 6313-22. The resolution was talked out.

[213] Ibid., May 21, 1970, pp. 7181-84.

[214] Ibid., pp. 7184-85.

[215] Ibid., pp. 7185-87.

[216] Ibid., May 28, 1970, pp. 7451-54. New Democrats Broadbent, Stanley Knowles, and Orlikow spoke in favour of the motion; Forest spoke against it.

[217] Conservatives: November 18 (non-confidence motion), 21, December 8 (non-confidence motion), January 20 (non-confidence motion), February 3, March 5 (non-confidence motion), April 21 (non-confidence motion), 28, May 8, 15, 22, June 8, 12, 18.

New Democrats: November 27, February 12, April 10, May 4 (non-confidence motion), June 1, 5.

Ralliement Créditiste: December 9, February 19, May 11, June 15.

[218] See above, pp. 299-300.

[219] H. of C. Debates, March 5, 1970, p. 4418. This debate occurred two and one-half months before those of the motions for papers just discussed.

[220] Ibid., p. 4421.

[221] Ibid., pp. 4418-59.

[222] Ibid., April 21, 1970, p. 6109.

[223] Ibid., pp. 6109-13 (Stanfield), 6113-17 (Douglas).

[224] Commons Committee on Agriculture, Minutes, May 12, 1970, p. 30:20.

[225] Commons Committee on Labour, Manpower and Immigration, Minutes, April 28, 1970, p. 4:10. Lambert was speaking to Mr. Lewis Couillard, Deputy Minister of the Department of Manpower and Immigration.

[226] Ibid., April 30, 1970, p. 5:9. Miss Scott's use of the term "law" is interesting.

[227] Commons Committee on Fisheries and Forestry, Minutes, March 5, 1970, p. 8:6. The motion was ruled out of order (March 10, 1970, p. 9:44) because the question of regulations had not been referred to the Committee. However, Mr. Peddle (Cons.) sought a commitment from the Minister "that we can go into this again." The reply was vague. (P. 9:87.)

[228] Ibid., March 17, 1970, pp. 11:46-48. Barnett was "rather concerned about the way it could be changed at the whim of a Minister" (p. 11:46), and he was later to suggest the repeal of this provision (s. 7) of the Fisheries Act when the amending Fisheries Bill was in Committee. (See above, p. 314, and n. 113.)

[229] Ibid., March 17, 19, 1970, pp. 11:46, 12:8. Mr. Stevens was

one of few witnesses representing interest groups who expressed such definite views of the need for parliamentary control of subordinate legislation, and showed such an awareness of government machinery.

[230] Ibid., March 19, 1970, p. 12:25.

[231] Commons Committee on Justice and Legal Affairs, Minutes, April 28, 1970, p. 24:38.

[232] Ibid., p. 24:38. McCleave (Cons.) and Blair (Lib.) also expressed some interest. (Pp. 24:46, 24:48.)

[233] Ibid., p. 24:40. Turner had outlined essentially the same program during debate of the Parliamentary Commissioner Bill three months earlier (see above, pp. 331-332), and was to do so again two months later when he appeared before the Senate Committee on Legal and Constitutional Affairs when that Committee began its study of the question of statutory instruments. (See below, p. 358.)

[234] Commons Committee on Miscellaneous Estimates, Minutes, March 18, 1970, p. 10:33. The assurance was given. Because the Committee's report was declared a nullity by the Speaker, the amendment did not pass the House. See H. of C. Debates, March 24, 1970, pp. 5405-08 for the discussion of this procedural issue.

[235] Five of the eight merely concerned the adequacy of specific regulations or groups of regulations. (February 12, May 11, 14, June 9, 11.) Another was an inquiry by Barnett as to why the Government had waited until then to make regulations authorized by a 1956 amendment to the Indian Act. (February 12.)

A seventh was McCleave's April 6 criticism of the Government's proclaiming in a piecemeal way the Criminal Code amendments respecting the breathalyzer test. He asserted that this procedure did not accord with his understnading of the intent of Parliament or the Committee on Justice and Legal Affairs which had studied the amendments during an earlier session. The issue proved to be the result of a misunderstanding and was clarified when that Committee considered the Justice Department's estimates. (Minutes, April 28, 1970, pp. 24:7-13.)

The eighth issue related to authority possessed by the Governor-in-Council with respect to C. R. T. C. decisions concerning broadcasting applications. In response to earlier questioning (for example, Debates, December 4, 9, 17, 1969, pp. 1587-88, 1743, 1747, 2092-93) as to whether the Government planned to review the Commission's rejection of cablevision applications, Secretary of State Pelletier had stated that although the Commission has "a high degree of autonomy, and quite rightly so," the Broadcasting Act did not "preclude action being taken by the Governor in Council, or guidelines being given to the C. R. T. C." (Debates, p. 1588.) During the January 13 adjournment debate he said that the Act (s. 23) "allows the Governor in Council to set aside or refer back to the commission for reconsideration its decision to issue, amend or renew a broadcasting license, but [that] there is no such authority in the case of a rejection of an application." (Debates, January 13, 1970, pp. 2351-52.) For other references to C. R. T. C. decision, see above, p. 336, and n. 197.)

[236] One of the others, the study of tobacco advertising undertaken by the Committee on Health, Welfare and Social Services, included the subject matters of bills C-34, C-69, and C-70. The orders for second readings of these bills had been discharged. (H. of C. Debates, November 14, 1969, p. 817.)

[237] Several times during the session, C. R. T. C. decisions were the subject of criticism relevant to this study. (See above, pp. 336-337 and n. 197.) For this reason, mention should be made at this point of one of the other six studi[illegible]the consideration given by the Committee on Broadcasting, Films and Assistance to the Arts to the decision restricting the importation of United States programs into Canada by cable. Committee discussion hinged on the C. R. T. C.'s interpretation of its mandate as stated in Sections 2 and 15 of the Broadcasting Act. The relevant parts of these sections as cited by Commission chairman Pierre Juneau (January 15, 1970, p. 17:8) are as follows:

Section 2(b): "The Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."

Section 2(d): ". . . the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources."

Conclusion of Section 2: ". . . the objectives of the broadcasting policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority."

Section 15: "Subject to this Act and the Radio Act and any directions to the Commission issued from time to time by the Governor in Council under the authority of this Act, the Commission shall regulate and supervise all aspects of the Canadian Broadcasting system with a view to implementing the broadcasting policy enunciated in Section 2 of this Act."

It is interesting that Mr. Juneau did not include Section 2(c) which declares that "the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned."

Mr.Juneau believed that the C. R. T. C. "must refuse to bear the responsibility for a principle that has been established by all Parliaments of Canada since 1932. . . . We have not established that principle ourselves. We have not established that Canadian broadcasting had to be Canadian. Parliament has. We are just faced with the responsibility of implementing that policy and it is a difficult policy to implement." (P. 17:62.) He implied, therefore, that if Parliament disagreed with Commission decisions it should amend the controlling legislation. This is a classic expression of the view that administrative and policy-making functions are clearly separable, a view which Mr. Juneau's critics were not prepared to accept.

[238] This included the subject matter of Bill C-116 (Criminal Code Amendment--Wire Tapping) which had been referred to the Committee. The order for second reading of the Bill was discharged. (H. of C. Debates, November 21, 1969, pp. 1083-84.)

[239] Commons Committee on Justice and Legal Affairs, Minutes, February 5, 1970, p. 7:78.

[240] Ibid., p. 7:79.

[241] Ibid., pp. 7:30, 7:22. Authority should be granted by a court, upon application by a minister of the Crown, the Committee believed. (P. 7:20.) The Committee's Minutes contained its Fourth Report.

[242] Ibid., p. 7:33.

[243] Ibid., p. 7:35.

[244] Commons Committee on Finance, Trade and Economic Affairs, Minutes, August 4, 1970, pp. 90:120-21. His interest in the matter of publication was, he said, the result of his membership on the Statutory Instruments Committee.

[245] Ibid. Mr. Dawson (Lib.) was "amazed" that the regulations could be ready so soon. Mr. Sylvain Cloutier (deputy minister) volunteered that "of course, the regulations have to be adjusted in the light of whatever changes may be made to the Bill in Parliament." (P. 90:121.)

[246] Ibid., p. 90:124.

[247] Ibid. Hon. Donald Jamieson had presented regulations before the House during debate of the Motor Vehicle Safety Bill. (See above, p. 310.)

[248] Ibid., August 5, 1970, pp. 91:39-40.

[249] Ibid., September 11, 1970, p. 93:110.

[250] Commons Committee on Broadcasting, Films and Assistance to the Arts, Minutes, May 5, 1970, p. 22:24. For other references to C. R. T. C. decisions, see above, p. 336, and n. 197.

[251] Ibid., pp. 22:24-25 (Stafford, Lib.), 22:32 (Perrault, Lib.), 22:46-47 and May 6, 1970, pp. 23:36-38 (Jean-R. Roy, Lib.), and 23:39-42 (Schumacher, Cons.). For criticism by the Canadian Association of Broadcasters see especially issue No. 20 (April 22, 1970). Association

president W. D. McGregor said in answer to a question by Schumacher that parliamentary clarification of Section 2 of the Broadcasting Act would be "an invaluable step forward." (June 11, 1970, p. 30:35.)

[252] Roy insisted that "I do not see how you can possibly make assessments of the television requirements in Canada unless you have made a study of the situation as it is and what the needs and requirements are." Further, he quoted Section 2(c) of the Broadcasting Act (see n. 237 above), which he claimed Mr. Juneau "disregard[s] at every opportunity," to support his complete rejection of the right of the C. R. T. C. to require a certain proportion of Canadian content in programming.

[253] Commons Committee on Broadcasting, Films and Assistance to the Arts, Minutes, May 5, 1970, pp. 22:32, 22:47.

[254] Ibid., May 6, 1970, p. 23:60. The quotation is part of Schumacher's question. Juneau's reply was "None."

[255] H. of C. Debates, November 21, 1969, p. 1083.

[256] Commons Committee on Public Accounts, Minutes, February 3, 1970, pp. 5:13-14.

[257] Ibid., p. 5:16. Cited by Mr. Henderson (Auditor General).

[258] Ibid., February 3, March 3, 1970, pp. 5:13-20, 11:4-5.

[259] Mr. Henderson, ibid., February 24, 1970, pp. 9:10-11. These included "refunds of customs duties on an estimated basis," "sales of goods unclaimed at Customs," "refunds of duty paid on goods diverted," and "determination of 'sale price' for sales tax purposes." (P. 9:11.)

[260] Ibid., p. 9:10.

[261] Ibid., pp. 9:11, 9:13.

[262] H. of C. Debates, April 29, 1970, p. 6440.

[263] Of the others, four were the tabling of regulations or of proposed regulations; another was the tabling of a press release concerning regulations; four were Government statements which referred to regulations; and one was the tabling of a proclamation (bringing into force part of an Act) and of regulations under that Act. The proclamation extended Part VI ("Exports and Imports") of the National Energy Board Act to oil. (S. C., 1959, c. 46, s. 87.) This is one of the few instances where the Statutes of Canada provide for annulment resolutions with the guarantee of debate. In this case, however, the proclamation was supported by all parties in the House. (H. of C. Debates, May 7, 1970, pp. 6671-72.) There was no discussion in the Senate when the

proclamation and regulations were tabled a week later by Hon. Paul Martin. (Senate Debates, May 12, 1970, p. 1014.)

[264] H. of C. Debates, April 6, 1970, pp. 5486-87. Brewin said substantially the same thing. (P. 5487.) Turner's announcement is on pp. 5485-86. The issue was the result of a decision by the Supreme Court of British Columbia that the breathalyzer provisions had not been properly proclaimed. (The Supreme Court of Canada upheld the breathalyzer legislation. See H. of C. Debates, June 26, 1970, pp. 8646-47.)

[265] Ibid., February 26, 1970, p. 4120.

[266] Ibid.

[267] Ibid., June 16, 1970, p. 8155.

[268] Ibid., p. 8158.

[269] Ibid., pp. 8157-58.

[270] Ibid., p. 8156.

[271] Senate Debates, October 30, 1969, pp. 73-74.

[272] Ibid., p. 73.

[273] Ibid., February 18, 19, 1970, pp. 588, 591.

[274] Ibid., March 19, 1970, p. 745.

[275] Ibid., April 23, 1970, p. 937.

[276] Ibid., March 19, 1970, p. 749.

[277] Ibid., March 4, 1970, p. 630.

[278] Ibid., April 9, 1970, pp. 825-26.

[279] Senator Gouin (Lib.) made the astonishing statement that those who draft regulations "are not responsible to anybody." (April 15, 1970, p. 852.) Senator Lamontagne (Lib.), however, disagreed that parliamentary supremacy was slipping; rather, "it has tended to become more of a reality." (April 7, 1970, p. 808.) He referred to the present as "a new era . . . as far as the sources of political influence are concerned." The present was "the twilight of civil servants," the result of an increasing influence of "the intellectual community outside the Civil Service," of provincial governments, of the mass media, and of Parliament itself as backbenchers become more vocal. (April 7,

1970, pp. 811-17.)

[280] Senate Debates, March 17, 19, 1970, pp. 720-22, 747. Both senators were referring to the Department of Agriculture's Vote 17b, in the supplementary estimates "B," which established the L. I. F. T. program. Senator Argue suggested that the resulting regulations were, if not illegal, at least contrary to principles contained in the report of the House of Commons Statutory Instruments Committee.

[281] Senate Debates, February 19, March 19, 1970, pp. 593, 746. It will be recalled that Kersell expressed similar concern, but that Arthurs maintained that the former of these wordings has in fact been used to make only "fairly routine procedural regulations." (Statutory Instruments Committee, Minutes, May 13, April 22, 1969, pp. 83-84, 25.) Senator Martin suggested that if the present motion were passed, the Legal and Constitutional Affairs Committee should consider the point. (Senate Debates, p. 593.)

[282] Senate Debates, April 15, 1970, pp. 853, 856, 859. Croll suggested that "a democratic process" such as public hearings should be required for "really important" regulations.

[283] Senate Debates, April 9, 1970, p. 829.

[284] Senate Debates, April 15, 1970, p. 856. At that point he was referring specifically to provincial Gazettes.

[285] Senate Debates, March 4, 19, 1970, pp. 632, 746.

[286] Senate Debates, April 14, 15, 1970, pp. 837-838, 853.

[287] Senate Debates, March 4, 12, 19, April 9, 14, May 7, 1970 (pp. 632, 705-707, 827, 841-42, 1011-12, 750, 838).

[288] Statutory Instruments Committee, Third Report, pp. 75, 1.

[289] Ibid., p. 75.

[290] Senate Debates, February 19, March 19, April 9, 14, 23, 1970 (pp. 594 and 831, 746, 831, 841, 937).

[291] Senate Debates, March 12, April 15, 1970, pp. 705, 853-54. Senator Hayden (Lib.) questioned the advisability of establishing a separate standing committee, but he had understood the discussion to refer to the scrutiny of enabling clauses rather than the subordinate legislation made pursuant to them. (April 21, 1970, p. 900.)

[292] Senate Debates, May 7, 1970, p. 1013.

[293] Senate Committee on Legal and Constitutional Affairs, Proceedings, June 17, 1970, p. 6:5.

[294] *Ibid.*, pp. 6:5-6.

[295] *H. of C. Debates*, June 16, 1970, pp. 8155-58.

[296] Senate Committee on Legal and Constitutional Affairs, *Proceedings*, June 17, 1970, p. 6:14. Turner had noted this general program earlier during debate of the Parliamentary Commissioner Bill and during consideration of the Justice Department estimates. (See above, pp. 331-332, 346.)

[297] *Ibid.*, pp. 6:7-12.

[298] *Ibid.*, p. 6:12.

[299] Turner did comment during that debate, however, "that the power of the [scrutiny] committee really is to draw to the attention of the government, Parliament and the public the fact that regulations may contravene the criteria which have been advanced by the committee on statutory instruments and may go beyond the powers that are given in the statute, and that the enabling power in the statute itself may be drawn too widely, although that should be a consideration for Parliament in the consideration of the bill itself." (*H. of C. Debates*, March 8, 1971, p. 4068.)

[300] Senate Committee on Legal and Constitutional Affairs, *Proceedings*, June 17, 1970, p. 6:11.

[301] *Ibid.*, p. 6:8.

[302] *Ibid.*, p. 6:16. For an elaboration of his views see *H. of C. Debates*, January 13, 1970, pp. 2324-28 (noted above pp. 331-332).

[303] *Ibid.*, p. 6:18.

[304] Senate Committee on National Finance, *Proceedings*, March 19, 1970, p. 4:16. These words had been added by the Commons Committee on Miscellaneous Estimates, but the entire report of that Committee was later to be declared a nullity by Mr. Speaker Lamoureux. See above, p. 346 and n. 234.

[305] *Ibid.*, p. 4:18.

[306] This Rule provides for motions for "the adjournment of the Senate for the purposes of raising a question of urgent public importance . . . before the House proceeds to the Orders of the Day." No notice is required for such a motion.

[307] The exceptions should be noted. One is Senator Martin's mention, during his résumé of the session's work, of the debate of his motion relating to statutory instruments. Opposition leader Flynn

omitted any reference to this debate in his summary. (Senate Debates, June 25, 1970, pp. 1383, 1385-87.) The second exception is the opposition of Mr. Nielsen to ministerial discretion granted by the Yukon Placer Mining Bill. His comments were made before the Special Joint Committee on the Constitution of Canada. (Minutes, September 15, 1970, pp. 14:17-18.)

APPENDIX F

FREQUENCY OF COMMENTS BY MEMBERS OF PARLIAMENT (1969-70)

Member	Critical of Gov't.[a]	Support of Gov't.[b]	Neutral	Total
		House of Commons		
Liberal				
Minister				
Turner	. .	12[c]	. .	12
Macdonald	. .	6	. .	6
Jamieson	. .	5	. .	5
Greene	. .	4[c]	. .	4
Olson	. .	4	. .	4
Gray	. .	1	1	2
Kierans	. .	1	1	2
Basford	. .	1	. .	1
Chrétien	. .	1	. .	1
Davis	. .	1	. .	1
Mackasey	. .	1	. .	1
McIlraith	. .	1	. .	1
Total	. .	38	2	40
Parliamentary Secretary[d]				
Cantin	4	. .	. .	4
Orange	1	3	. .	4
Forest	. .	2	. .	2
Gendron	. .	1	. .	1
Haidasz	. .	1	. .	1
Walker	. .	1	. .	1
Total	5	8	. .	13
Backbenchers				
MacGuigan	2	1	. .	3
Murphy	2	. .	. .	2
Pringle	1	1	. .	2
Stewart, R.	2	. .	. .	2
Blair	. .	. .	1	1
Chappell	1	. .	. .	1

APPENDIX F--Continued

Member	Critical of Gov't.[a]	Support of Gov't.[b]	Neutral	Total
House of Commons				
Liberal (cont'd.)				
Backbenchers (cont'd.)				
Cyr	1	. .	. .	1
Douglas, A.	. .	1	. .	1
Foster	. .	1	. .	1
Francis	1	. .	. .	1
Gillespie[e]	. .	1	. .	1
Goode	1	. .	. .	1
Hymmen	. .	1	. .	1
Isabelle[e]	. .	. .	1	1
Mahoney	. .	. .	1	1
Osler	. .	1	. .	1
Perrault	. .	. .	1	1
Robinson	1	. .	. .	1
Roy, J.-R.	. .	. .	1	1
St. Pierre	1	. .	. .	1
Stafford	. .	. .	1	1
Total	13	7	6	26
Total Liberal	18	53	8	79
Conservative				
Baldwin	39	1	2	42
Lambert, M.	10	2	1	13
Aiken	8	. .	. .	8
Comeau	6	. .	. .	6
McCleave	3	1	2	6
Crouse	5[f]	. .	. .	5
Woolliams	5	. .	. .	5
McGrath	2	1	1	4
Nielsen	4	. .	. .	4
Stanfield	4	. .	. .	4
Danforth	3	. .	. .	3
Fairweather	2	. .	1	3
Nesbitt	2	. .	1	3
Bigg	2	. .	. .	2
Dinsdale	2	. .	. .	2
Harkness	2	. .	. .	2
Howe	2	. .	. .	2
Korchinski	2	. .	. .	2
Ritchie	1	1	. .	2
Thompson	2	. .	. .	2

APPENDIX F--Continued

Member	Critical of Gov't.[a]	Support of Gov't.[b]	Neutral	Total
House of Commons				
Conservatives (cont'd.)				
Alexander	1[f]	. .	. .	1
Carter	1	. .	. .	1
Hales	1	. .	. .	1
Lundrigan	1	. .	. .	1
McIntosh	1	. .	. .	1
McQuaid	1	. .	. .	1
Moore	. .	1	. .	1
Muir, G.	. .	. .	1	1
Schumacher	. .	. .	1	1
Total Conservative	112	7	10	129
New Democratic Party				
Brewin	7[f]	2	. .	9
Barnett	5	. .	3	8
Burton	6	. .	1	7
Harding	5	. .	. .	5
Howard, F.	4	. .	. .	4
Mather	3	. .	1	4
Skoberg	2	1	1	4
Douglas, T. C.	1	. .	2	3
Gleave	3	. .	. .	3
Knowles, S.	2	1	. .	3
Benjamin	1	. .	1	2
Broadbent	2	. .	. .	2
MacInnis	2	. .	. .	2
Orlikow	2	. .	. .	2
Winch	2	. .	. .	2
Lewis	1	. .	. .	1
Rose	1	. .	. .	1
Total N. D. P.	49	4	9	62
Ralliement Creditiste				
Fortin	2	. .	. .	2
Rondeau	1	. .	1	2
Total R. Cred.	3	. .	1	4
Total H. of C.	182	64	28	274

APPENDIX F--Continued

Member	Critical of Gov't.[a]	Support of Gov't.[b]	Neutral	Total
Senate				
Liberal				
Martin	1	5	4	10
Phillips, L.	5	. .	3	8
Fergusson	2	3	2	7
Connolly, J.	1	2	2	5
Gouin	2	1	1	4
Argue	2	. .	1	3
Carter	2	1	. .	3
Lamontagne	1	1	1	3
Cameron (Ind. Lib.)	1	. .	1	2
Hayden	1	. .	1	2
Thompson	. .	1	1	2
Croll	1	. .	. .	1
Kinley	1	. .	. .	1
Lang	. .	. .	1	1
Leonard	1	. .	. .	1
Petten	. .	1	. .	1
Prowse	. .	. .	1	1
Smith	. .	1	. .	1
Urquart	. .	. .	1	1
Total Liberal	21	16	20	57
Conservative				
Grosart	9	3	. .	12
Flynn	4	3	1	8
O'Leary	3	1	. .	4
Macdonald, J. M.	1	. .	2	3
Fournier, E.	2	. .	. .	2
Hollett	. .	. .	2	2
Sullivan	1	1	. .	2
Aseltine	1	. .	. .	1
Phillips, O.	1	. .	. .	1
Yuzyk	. .	1	. .	1
Total Conservative	22	9	5	36
Total Senate	43	25	25	93
Total Parliament	225	89	53	367

[a] Includes the urging of Government action.

[b] Includes Government opposition to urged action.

[c] Includes two comments made by each minister before Senate committees.

[d] Appointments terminated on September 30, 1970.

[e] These members became parliamentary secretaries on October 1, 1970, but this is not significant for the session.

[f] One attempt to increase the delegation of authority.

APPENDIX G

HOUSE OF COMMONS SPECIAL COMMITTEE ON STATUTORY INSTRUMENTS, 1968-69: RECOMMENDATIONS[1] AND THEIR IMPLEMENTATION

"1. Regulations made in the exercise of the prerogative power of the Governor in Council, insofar as they are of a legislative character, should be subject to the same procedures and requirements as other regulations of a legislative character."

Comment: These are statutory instruments but not regulations, and are therefore not subject to the same control as are regulations. Mr. Turner was incorrect when he said that this recommendation was "incorporated in" the Statutory Instruments Act.[2]

"2. Except in the interests of national security, there should be no exemptions from the requirements of the Regulations Act other than as to publication."

Comment: The exemptions are broader in the Statutory Instruments Act, in terms of both the reasons for exemption and the control mechanisms from which exemptions are made.

"3. Rules governing practice or procedure in judicial proceedings should not be excluded from the requirements of the Regulations Act."

Comment: Implemented as Section 2(b) of the Statutory Instruments Act.

"4. The Regulations Act should be amended to provide a more inclusive definition of the word 'regulation.'"

Comment: Because the Statutory Instruments Committee did not anticipate a distinction between "regulation" and "statutory instrument," it is difficult to compare the Committee's recommendation with the new legislation. The Committee urged an expansion of the definition of "regulation" to include directives, use of the Royal prerogative, and subdelegated legislation; the new Act defined the first two as "statutory instruments" but was silent about the third.

"5. The Minister of Justice should be charged with the responsibility of deciding for all regulation-making authorities which documents should be classified as regulations."

Comment: This is implemented as Section 4 of the Statutory Instruments Act, although the responsibility is left with the Deputy Minister. In Baldwin's opinion, this is a serious deviation from the recommendation in that the Committee wanted the Minister to be responsible.[3]

"6. All departmental directives and guidelines as to the exercise of discretion under a statute or regulation where the public is directly affected by such discretion should be published and also subjected to parliamentary scrutiny."

Comment: These guidelines and directives are subject to the same control as are all statutory instruments. Only if they are declared to be regulations must they be published.

"7. All enabling acts for regulation-making authorities should accord with the following principles:

"(a) The precise limits of the law-making power which Parliament intends to confer should be defined in clear language."

Comment: This is not explicitly implemented but, hopefully, it will be in fact.

"(b) There should be no power to make regulations having a retrospective effect."

Comment: Implemented by cabinet directive.

"(c) Statutes should not exempt regulations from judicial review."

Comment: Implemented by cabinet directive.

"(d) Regulations made by independent bodies, which do not require governmental approval before they become effective, should be subject to disallowance by the Governor in Council or a Minister."

Comment: Not implemented.

"(e) Only the Governor in Council should be given authority to make regulations having substantial policy implications."

Comment: The cabinet directive is more restrictive in that it prohibits the delegation of this power to any recipient.

"(f) There should be no authority to amend statutes by regulation."

Comment: Implemented by cabinet directive.

"(g) There should be no authority to impose by regulation anything in the nature of a tax (as distinct from the fixing of the amount of a license fee or the like). Where the power to charge the fees to be fixed by regulations is conferred, the purpose for which the fees are to be charged should be clearly expressed."

Comment: Implemented by cabinet directive.

"(h) The penalty for breach of a prohibitory regulation should be fixed, or at least limited by the statute authorizing the regulation."

Comment: Implemented by cabinet directive.

"(i) The authority to make regulations should not be granted in subjective terms."

Comment: Not implemented, although the Government has indicated that most delegations in subjective terms can be eliminated.[4]

"(j) Judicial or administrative tribunals with powers of decision on policy grounds should not be established by regulations."

Comment: Not implemented, unless it is covered under (e), above.

"8. The Minister of Justice should, where he deems it appropriate, refer the enabling clauses in any Government bill to the proposed Standing Committee on Regulations at the same time as the bill is referred to the relevant Standing Committee for Committee consideration."

Comment: Not implemented. The Honourable A. J. MacEachen, President of the Privy Council, remarks that "it is impossible to say at this point" whether the recommendation will be adopted, but that "this can be presumed doubtful."[5]

"9. Before making regulations, regulation-making authorities should engage in the widest feasible consultation, not only with the most directly affected persons, but also with the public at large where this would be relevant. Where a large body of new regulations is contemplated, the Government should consider submitting a White Paper, stating its views as to the substance of the regulations, to the appropriate Standing Committee. When enabling provisions and statutes are being drawn, consideration should be given to providing some type of formalized hearings on [sic] consultation procedures where appropriate."

Comment: Not implemented, although widespread consultation appears to be customary. Mr. Turner said that the recommendation has been agreed to in part.

"10. The Government should take all necessary steps to facilitate the expansion of the Legislative Section of the Department of Justice and to provide thorough training for legal officers in the Department, including those seconded to other departments, in the drafting of regulations."

Comment: Mr. Turner said that this has been implemented.

"11. The present examination of regulations by the Privy Council Office as to form and draftsmanship and by the Department of Justice as to conformity with the Canadian Bill of Rights, should be continued, and the scrutiny by the Department of Justice should also take into account the other criteria for regulations proposed in this Report."

Comment: Mr. Turner said that the Government has agreed to this.

"12. The Regulations Act should provide, as a general rule, that a regulation shall not come into force until the date on which it is transmitted to the Clerk of the Privy Council. In cases of emergency a regulation might come into effect at the time of making."

Comment: Implemented by Section 9 of the Statutory Instruments Act.

"13. Section 9 of the Regulations Act, which allows exemptions from the provisions of that Act, should be amended to provide for exemptions from publication and time of publication only."

Comment: The Statutory Instruments Act permits greater exemption (s. 27).

"14. All regulations, regardless of the regulation-making authority, should be available for public inspection."

Comment: This is implemented by Sections 24 and 25 of the Statutory Instruments Act, although exemptions are permitted (s. 27[d]).

"15. The statutes should resort more than they do now to the use of provisions stating that the regulations made thereunder, or under specified sections thereof, do not become effective until published on some specified period thereafter."

Comment: Not implemented, although Mr. Turner said that this has been accepted in principle.

"16. Regulations should be consolidated on a much more regular and frequent basis than has been the practice in the past, and at least once every five years."

Comment: Except for the five-year requirement of the recommendation, this was implemented by Section 16 of the Statutory Instruments Act. Mr. Turner was incorrect in his remark that the recommendation had been implemented "in its entirety" in the Act.

"17. The present quarterly consolidated index and table of Statutory Orders and Regulations should include reference to all regulations which have been exempted from publication."

Comment: This is implemented by Section 14 of the Statutory Instruments Act, although exemptions are permitted for reasons described in Section 27(c)(iii).

"18. All regulations should be laid before Parliament forthwith after their transmittal to the Clerk of the Privy Council and their recording and numbering by him. Votes and Proceedings should list under 'Returns and Reports Deposited with the Clerk of the House' the title of each regulation (which should be as descriptive as possible), the Act under which it is made, its date and the date of its transmittal."

Comment: Implemented by the Statutory Instruments Act to the extent that the Canada Gazette is distributed to all members of Parliament (s. 13).

"19. A new Committee on Regulations should be established, with the following particulars:

"(1) It should be a Standing Committee of the House of Commons."

Comment: Not implemented, but a joint committee was established.

"(2) All regulations should stand permanently referred to it."

Comment: Implemented by Section 26 of the Statutory Instruments Act.

"(3) It should strive to operate in an objective and non-partisan way."

Comment: This is assumed.

"(4) It should have a small membership to enable it to operate effectively."

Comment: There are twelve members of the House of Commons and eight Senators.

"(5) To make the objectivity of the Committee apparent, there should be some rotation among parties in the chairmanship."

Comment: This will have to be determined from experience. The first co-chairmen were Conservative (from the House of Commons) and Liberal (from the Senate).[6]

"(6) It should normally sit in public session."

Comment: This has not been determined, although Mr. Turner agreed in principle.

"(7) It should be empowered to sit while Parliament is not sitting."

Comment: This has not been determined, although Mr. Turner agreed with the recommendation.

"(8) It should have adequate staff."

Comment: This is assumed.

"(9) It should examine regulations on the basis of six criteria:
- (a) Whether they are authorized by the terms of the enabling statute.
- (b) Whether they appear to make some unusual or unexpected use of the powers conferred by the statute under which it is made.
- (c) Whether they trespass unduly on personal rights and liberties.
- (d) Whether they have complied with the provisions of the Regulations Act with respect to transmittal, certification, recording, numbering, publication or laying before Parliament.
- (e) Whether they
  - (i) represent an abuse of the power to provide that they shall come into force before they are transmitted to the Clerk of the Privy Council or
  - (ii) unjustifiably fail to provide that they shall not come into force until published or until some later date.
- (f) Whether for any special reason their form or purport calls for elucidation."

Comment: This has not been determined, although Mr. Turner appeared to agree with the recommendation.

"(10) It should have the usual investigative powers of a Standing Committee."

Comment: This has not been determined, although Mr. Turner agreed with the recommendation.

"(11) It should have the same power as other Standing Committees to report to the House."

Comment: This has not been determined, although Mr. Turner agreed with the recommendation.

"20. The Scrutiny Committee should have the power, in its discretion, to refer regulations to other Standing Committees and that they should then stand referred to such Committees for consideration."

Comment: This has not been determined.

"21. Normally Parliament should exercise its power to review by a resolution that a questionable regulation be referred to the Government for reconsideration but Parliament should continue to provide, where appropriate in individual statutes, for a procedure by way of affirmative or negative resolution."

Comment: This has not been determined, although Section 28(3) of the Statutory Instruments Act implies that provision for affirmative and negative resolutions will continue in certain Acts.

"22. The Scrutiny Committee should have the power to report at any time on general matters affecting the law or practice with respect to regulations."

Comment: This has not been determined, but Mr. Turner agreed with the recommendation.

"23. Your Committee should be reconstituted in the next session to allow further consideration of certain matters referred to in this Report."

Comment: Not implemented. No explanation has been given by the Government, and apparently no member of Parliament has asked for one.

Footnotes

[1] Statutory Instruments Committee, *Third Report*, pp. 90-93.

[2] *H. of C. Debates*, March 8, 1971, p. 4065. Later references to Turner in this Appendix are to pp. 4066, 4067, 4150, 4157.

[3] *Ibid*., March 10, 1971, p. 4154.

[4] Statutory Instruments Committee, *Minutes* (Appendix "J"), October 7, 1969, p. 259.

[5] Letter from Hon. A. J. MacEachen, President of the Privy Council, January 11, 1974.

[6] Mr. Fairweather and Senator Forsey. (*H. of C. Debates*, March 7, 1973, Appendix, p. 13.) They were re-appointed for the current (second) session. (*H. of C. Debates*, April 10, 1974, Appendix, p. 13.)